84-1002

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge for the District of Kansas,
Respondent,

(PHYLLIS WILSON HOFFMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Real-Parties-in-Interest.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may seek class relief without satisfying the administrative requirements of Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, when it intervenes permissively in a private action and the private plaintiff has not not sought class certification.

STATEMENT RE PARTIES

In addition to Petitioner United Telecommunications, Inc., the following companies were named as defendants in the District Court action:

United System Service, Inc.
Carolina Telephone & Telegraph Company
United Telephone Company of Ohio
Capital City Telephone Company
United Telephone Company of Iowa
United Telephone Company of Kansas, Inc.
United Telephone Company of Minnesota (Pioneer United)
United Telephone Company of Missouri
United Telephone Company of Arkansas
Midstate Telephone Company
United Telephone Company of the West
United Telephone Company of Florida
United Telephone Company of the Northwest
California-Oregon Telephone Company
East Peninsula Telephone Company
Florida Telephone Corporation
New Jersey Telephone Company
United Telephone Company of Pennsylvania (Peoples)
Gulf States-United Telephone Company (Palestine & Navasota merged into)
Palo Pinto Telephone Company, Inc.
United Telephone Company of Indiana, Inc.
United Telephone Company of Michigan (Augusta)
United Inter-Mountain Telephone Company
United Telephone Company of the Carolinas, Inc.
Keller Telephone Company
Alexandria Telephone Cable Company

Blacktown Telephone Company (Subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania)
North Electric Company
ULI Leasing, Incorporated
North Electric Company Supply Division
Rixon Electronics, Inc.
United Computing Systems, Inc.
UCS, Inc.
United Business Communications
Central Kansas Power Company, Inc.
National Datacenter
CITICOM, Inc.
National Laboratory of Urban Communications, Inc.
The Citizens Ice Company.

Petitioner United Telecommunications, Inc. is the only parent corporation. The only non-wholly-owned subsidiaries and affiliates of United Telecommunications, Inc. are: Vista-United Telecommunications; Equipos de Telecomunicaciones North Supply Chile Limitada; and UNINET Research and Development Company.

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Statute:

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*) :
Section 705, 42 U.S.C. § 2000e-4 ..... 2, 4
Section 706, 42 U.S.C. § 2000e-5 ..... *passim*
Section 707, 42 U.S.C. § 2000e-6 ..... 2, 11, 13

Other:

Fed. R. Civ. P. 23 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ——

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge for the District of Kansas,
Respondent,

(PHYLLIS WILSON HOFFMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Real-Parties-in-Interest.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Tenth Circuit entered on August 15, 1984, dismissing a petition for a writ of mandamus. The mandamus petition sought the vacating of orders entered on April 11 and May 24, 1984, by the Honorable Dale E. Saffels, United States District Judge for the District of Kansas.

OPINIONS BELOW

The order and opinion of the Court of Appeals are reported at 741 F.2d 312 and are reproduced in Appendix A, *infra*, pp. 1a-5a. The Memoranda and Orders of the District Court, dated April 11 and May 24, 1984, which were the subjects of the mandamus petition, are unreported. The April 11, 1984, Memorandum and Order is reproduced in Appendix B, *infra*, pp. 6a-10a; the May 24, 1984, Memorandum and Order is reproduced in Appendix C, *infra*, pp. 11a-14a. A third Memorandum and Order of the District Court, dated October 3, 1984, also is unreported and is reproduced in Appendix D, *infra*, pp. 15a-17a.

JURISDICTION

The decision of the Court of Appeals was entered on August 15, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on September 28, 1984 (Appendix E, *infra*, pp. 18a-19a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of Sections 705, 706, and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-4, § 2000e-5, and § 2000e-6, and Rule 23, Federal Rules of Civil Procedure, are reproduced in Appendix F, *infra*, pp. 20a-24a.

STATEMENT OF THE CASE

A. The Relevant Proceedings Below

On November 5, 1976, Phyllis Wilson Hoffman ("Hoffman") brought suit in the United States District Court for the District of Kansas against United Telecommunications, Inc. ("UTI") and 38 UTI subsidiaries. UTI and its subsidiaries are engaged primarily in providing telephone services to the public; they do business in some 35 states and operate over 100 separate facilities. Hoffman had been employed from February 1972 to May 1975 in the Industrial Relations Department of United System Service, Inc. ("USSI"), a UTI subsidiary.

Hoffman's complaint (Appendix G, *infra*, pp. 25a-41a) stated that on July 23, 1975, Hoffman had filed a sex discrimination charge with the Equal Employment Opportunity Commission ("EEOC"), that on September 27, 1975, the EEOC had assumed jurisdiction of the charge, and that on August 10, 1976, Hoffman had received from the EEOC a right to sue letter. Hoffman's complaint alleged that USSI, in violation of Title VII of the Civil Rights Act of 1964, as amended, had discriminated against Hoffman on the basis of her sex with respect to initial job assignment, training and promotion opportunities, salary and termination. In addition, Hoffman sought in her complaint to represent a class composed of "all females who are, were, or might be employed by [UTI and its subsidiaries] in managerial or professional positions at its headquarters in Westwood, Kansas, and at all offices of its subsidiaries and affiliates, and who have been or continue to be or might be adversely affected by the practices complained of" (App. G, *infra*, p. 28a). As thus described in

Hoffman's complaint, the class could include approximately 40,000 individuals. The complaint further alleged that UTI and its subsidiaries were engaged in widespread discriminatory employment practices against women in violation of Title VII. Further, Hoffman stated in her complaint that her action was brought pursuant to Rules 23(a) and (b) of the Federal Rules of Civil Procedure and that the requirements for bringing such a suit were satisfied (App. G, *infra*, p. 28a-29a).

On June 30, 1977, more than two years after Hoffman had filed her charge with the EEOC and ten and one-half months after the EEOC had issued a right to sue letter, the EEOC moved to intervene permissively in this action pursuant to Rule 24(b)(1), Federal Rules of Civil Procedure, and Sections 705(g)(6) and 706(f)(1) of Title VII. The claims which the EEOC raised in its Complaint in Intervention (Appendix H, *infra*, pp. 42a-48a) were nearly identical to those raised in Hoffman's complaint and involved the same purported class of females. Indeed, the EEOC stated in a Memorandum in Support of Motion To Intervene (App. H, *infra*, pp. 49a-54a) that "[s]ince no new claims are raised by the Commission, the proposed intervention cannot be deemed to depart from the 'field of litigation' established by the original parties." Further, the EEOC expressed no intention to displace Hoffman as the class representative through the intervention. Rather, it stated that the purpose of its intervention was to assist the Court in the compilation and analysis of statistical data and to "assist in the class delineation" (App. H, *infra*, p. 50a). UTI and the other defendants objected, but on September 21, 1977, the District Court allowed the EEOC's intervention.

On December 8, 1983, after protracted discovery and briefing, the District Court entered an order asserting jurisdiction over all UTI subsidiaries named as defendants in Hoffman's complaint.

On January 27, 1984, the EEOC and Hoffman filed a joint motion in the District Court for an order allowing the EEOC to act as the representative of the putative class described in Hoffman's complaint. In support of the motion, Hoffman and the EEOC stated that their motion was for the purpose of "avoiding the discovery and hearings necessary to obtain a determination pursuant to Rule 23 of the Federal Rules of Civil Procedure in regard to certification of [Hoffman] as a class representative and certification of this action as a class action" (Memorandum in Support of Joint Motion, pp. 4-5). UTI and the other defendants opposed the motion on the grounds, *inter alia*, that its purpose was to undermine and circumvent the policies embodied in Title VII.

On April 11, 1984, the District Court granted the motion filed by the EEOC and Hoffman, and stated in its order that it was permissible for "the EEOC to act as the class representative without following the Rule 23 model" (App. B., *infra*, p. 10a). UTI and the other defendants then moved the District Court to certify the April 11 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and to stay proceedings in the case pending appeal. On May 24, 1984, the District Court denied the latter motions (App. C, *infra*, pp. 11a-14a).

On June 8, 1984, UTI and the other defendants in the District Court suit petitioned the Court of Appeals for a writ of mandamus for the review and

vacating of the District Court's orders of April 11 and May 24, 1984. The Court of Appeals, on August 7, 1984, dismissed the mandamus petition for want of jurisdiction, ruling that the District Court had not abused its discretion with respect to the challenged orders (App. A, *infra*, pp. 1a-5a). On September 28, 1984, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (App. E, *infra*, pp. 18a-19a).

On October 3, 1984, the District Court denied a motion by UTI and the other defendants for an order conforming Hoffman's and the EEOC's pleadings to the District Court's prior rulings. The requested order, *inter alia*, would have stricken from Hoffman's complaint the class claims set forth therein. The District Court nevertheless indicated that such action would be taken in a future, pre-trial order, declaring in this respect:

> . . . the court agrees with defendant that there is no authority to allow plaintiff Hoffman's class claims to be held 'in limbo.' The purposes of the court's ruling allowing the EEOC to proceed as class representative would not be advanced by allowing [Hoffman] to retain the option to proceed as class representative.

App. D, *infra*, p. 16a.

B. The EEOC's Failure To Comply With Section 706(b)'s Administrative Procedures

The EEOC made no attempt whatsoever to satisfy Section 706(b)'s administrative procedures before it was permitted to intervene in Hoffman's private action. Thus, the EEOC did not investigate any of the claims contained in Hoffman's charge of employment

discrimination, and neither issued a finding of "reasonable cause" nor attempted conciliation within Title VII's meaning.

C. The District Court's Rulings of April 11 and May 24, 1984

In its April 11, 1984, Memorandum and Order, the District Court acknowledged that the EEOC may file its own Section 706 complaint to vindicate individual rights only after completion of its administrative processes (App. B, *infra*, p. 9a). It also acknowledged that had not the EEOC been allowed to intervene, Hoffman, as a plaintiff in a private action, would be bound by the requirements of Rule 23 (*Idem*, p. 8a). Nevertheless, even though EEOC's administrative processes had not been initiated, much less completed, and even though there had been no Rule 23 inquiry whatsoever, the District Court decided that the EEOC could act as the representative of the class designated in Hoffman's complaint without certification as class representative and without formal class certification. As grounds for its action, the District Court declared that its decision "would further the purposes of Title VII," and "would prevent additional unnecessary delays" (*Idem*, p. 7a). The sole legal authority relied upon by the District Court was this Court's opinion in *General Telephone Company of the Northwest v. EEOC*, 446 U.S. 318 (1980), wherein it was held that Rule 23, Federal Rules of Civil Procedure, has no applicability to enforcement actions brought by the EEOC in its own name pursuant to § 706 of Title VII.

As stated, *supra*, p. 5, the District Court refused to certify its April 11, 1984, order for interlocutory

appeal pursuant to 28 U.S.C. § 1292(b). Ruling on the request for such certification, the District Court declared in a Memorandum Decision and Order, dated May 24, 1984, that its April 11 order "does not expand nor attempt to expand the scope of this litigation" and did not present "a controlling question of law" (App. C., *infra*, p. 13a).

D. The Court of Appeals' Decision

Noting that the EEOC was required "to satisfy certain administrative procedures" of Section 706(b) before initiating a law suit on its own, and that the statute permitted the EEOC to intervene in a suit brought as a private action "without requiring the satisfaction of those administrative procedures", the Court of Appeals stated: "It would be a tortured construction to conclude that when intervening, the Commission somehow becomes subject to Rule 23 when in fact the Supreme Court has made clear that the Commission is not subject to Rule 23 when bringing a direct action in the first instance" (App. A, *infra*, p. 4a). For that reason, the Court of Appeals held that the District Court "had jurisdiction to permit intervention on the terms and conditions in this case", and that it therefore lacked jurisdiction to review the District Court's action by way of mandamus (*Idem*, p. 5a).

Significantly, the Court of Appeals said nothing with respect to the question of whether the EEOC, after it has intervened permissibly in a private action in which Rule 23 has not been complied with, may nevertheless seek class relief without satisfying the administrative procedures of Section 706(b).

REASONS FOR GRANTING THE WRIT

1. The action of the District Court, as affirmed by the Court of Appeals, permits the EEOC to bypass totally the administrative prerequisites contained in Section 706 of Title VII whenever the EEOC seeks to obtain class relief by intervening in a private action. Such agency action not only subverts congressional intent, as demonstrated by the clear language of the statute, but also permits unbridled expansion of federal court litigation under Title VII.

Such errors result from the Court of Appeals' misconstruction of the nature and effect of the District Court's challenged actions. The April 11, 1984, Order of the District Court was predicated on that court's seeming belief that the strict requirements of Rule 23 would make it extremely time consuming and difficult to litigate the broad class claims asserted by Hoffman in the context of a private class action. The solution adopted by the District Court to this difficulty was to have the class claims litigated solely by the EEOC in the context of its suit in intervention and to limit Hoffman's private action to her own personal claims. The District Court erroneously relied on this Court's opinion in *General Telephone Company of the Northwest v. E.E.O.C.*, 446 U.S. 318 (1980), wherein it was held that, where the EEOC has completed the administrative processes mandated by § 706 of Title VII, the EEOC may seek class relief in a direct enforcement action without satisfying the requirements of Rule 23. Thus, the District Court's April 11, 1984, Order effectively transformed the original suit from a proposed private class action into a direct enforcement action by the EEOC. Moreover, in its October 3, 1984, Order (App. D,

infra, pp. 15a-17a), which was issued after the Circuit Court dismissed Petitioners' mandamus petition, the District Court acknowledged that this fundamental transformation of the original suit had, in fact, occurred by indicating that the private plaintiff, Hoffman, could no longer seek to press the class claims originally set forth in her complaint and that now only the EEOC could seek relief for such claims.

Despite the fundamental transformation of the original action effected by the District Court, the Court of Appeals addressed only the narrow, and irrelevant, issue of whether the EEOC must comply with Rule 23 requirements as a condition of intervention in a private Title VII action which is also proceeding as a class action.[1] The Court of Appeals thereby failed to come to grips with the significant issue raised by Petitioners' mandamus petition.[2]

2. By failing to consider or address the administrative requirements of Section 706 of Title VII, the

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[1] To the extent that Rule 23 is here involved at all, it would become relevant only at the remedy stage. Thus, if certiorari is granted, this Court may wish to consider the further issue of whether the EEOC, having irrevocably bypassed its administrative processes, may remedy the jurisdictional infirmity in its present action by either the EEOC or the private plaintiff demonstrating compliance with the requirements of Rule 23.

[2] Petitioners argued to the Court of Appeals that "where the EEOC neglects to process a claim or claims through its administrative process, it is barred from seeking relief for such claims in a direct suit brought by it pursuant to § 706" and, therefore, that "the EEOC may not, in the guise of a permissive intervenor, circumvent this limitation on its authority and seek to litigate independently class claims which have never been made the subject of the required administrative processes." Petitioners' Brief In Support of Mandamus Petition, p. 20.

Court of Appeals overlooked the critical nature of that section.[3] Section 706 sets forth an "integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in Federal court." *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 359 (1977). Discussing this statutory mechanism in *Occidental Life*, the Court stated that the EEOC is "required to investigate the charge and determine whether there is reasonable cause to believe it is true . . ." and, once finding reasonable cause, "it shall endeavor to eliminate any such unlawful employment practice by . . . conciliation." *Ibid.* If an acceptable conciliation agreement cannot be secured, then and only then may the EEOC bring a civil action. *Id.* at 360.[4] Further, in *Occidental Life*, the Court noted that although the 1972 Amendments to Title VII gave the EEOC the addi-

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[3] The Court of Appeals apparently believed that because the failure to complete the § 706 administrative processes does not bar the EEOC's intervention into a private suit, this failure had no further relevance. However, Petitioners do not seek to challenge the EEOC's intervention in the first instance. Rather, the petition for mandamus raised the far different matter of whether, once having intervened, the EEOC could thereafter litigate class claims independently of the underlying private, individual action.

[4] Unlike the EEOC, the private litigant's right to sue in federal court is not contingent upon the prior completion of these administrative procedures. See Section 706(f). The statutory distinction between private actions and EEOC suits under Title VII emphasizes the importance Congress attached to the necessity of the EEOC meeting its administrative requirements so that conciliation would precede EEOC litigation. Furthermore, Section 707(e) specifically requires that pattern or practice suits brought by the EEOC must "be conducted in accordance with the procedures set forth in Section [706]."

tional enforcement power of instituting a civil action, Congress preserved the EEOC's administrative functions as set forth in § 706 of the Act. *Id.* at 368. The procedural structure of the Act, the Court said, makes it clear that "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties." Rather, the Court continued, the Act was designed to ensure that the EEOC as a federal administrative agency would investigate and attempt to settle employment discrimination claims in an informal, noncoercive fashion. *Ibid.* Accordingly, the Court concluded, "the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Ibid.*

In allowing the EEOC to abandon Section 706's administrative requirements, the Court of Appeals ignored this Court's pronouncements in *Occidental Life.* Thus, the Court of Appeals focused erroneously on whether the EEOC, *before intervening*, had to meet Section 706's administrative requirements and did not address the more pertinent question of whether the EEOC, *before seeking class relief*, had to satisfy the necessary administrative prerequisites. This error led the Court of Appeals to reject Petitioners' contentions because it "would be a tortured construction to conclude that when intervening, the Commission somehow becomes subject to Rule 23 when in fact the Supreme Court has made clear that the Commission is not subject to Rule 23 when bringing a direct action in the first instance." (App. A, *infra*, p. 4a).

In fact, it is the Court of Appeals' decision that is based upon a misconstruction of Title VII. Thus, the

District Court's action has resulted in the establishment of two separate and independent suits, one by the private plaintiff Hoffman seeking relief for her individual claims only, and another by the EEOC seeking relief on behalf of an extremely large and variegated class of individuals with claims involving a myriad of differing factual and legal circumstances. It is beyond dispute that had the EEOC sought to bring its separate action as a direct suit in another federal court, that action would have been dismissed because of the EEOC's failure to complete its administrative processes with regard to the claims it was seeking to litigate. The Court of Appeals, however, in actuality, although not in name, allowed such a separate EEOC action by focusing exclusively on the procedural quirk that the EEOC had decided to initiate its suit through the route of permissive intervention in a private action rather than through a direct enforcement action under § 706 or § 707. In reaching this result, the Court of Appeals has sanctioned a procedure which would allow the EEOC to use intervention as a route to circumvent its statutory duties in every case and expand private, individual actions into ones seeking broad class relief, including relief for claims encompassing different bases of discrimination and employment issues. In this connection, the district court in *Bell v. McDermott & Company, Inc.*, 30 EPD ¶ 33,310, p. 28,312 (E.D. La. 1982) recognized the error of approving such procedure by stating that "it would be highly prejudicial to the defendant . . . to allow the EEOC to do indirectly what it cannot do directly. . . . This was not the intent of Congress in providing for intervention." *Id.* at p. 28,315.

3. Mandamus is a proper remedy when a lower court impermissibly expands its jurisdiction. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953). Here, such an impermissible expansion has been undertaken by the District Court. Thus, as a general principle, a court may not entertain new claims raised by a permissive intervenor in addition to those raised by the original plaintiff unless the intervenor establishes that the court possesses a separate basis of jurisdiction on which to adjudicate the additional claims. *Blake v. Pallan*, 554 F.2d 947, 956 (9th Cir. 1977); *Reedsburg Bank v. Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975).

In the context of Title VII, the EEOC as an intervenor can establish such a separate jurisdictional basis only where it has met the prerequisites to a direct suit in its own name on the additional claims—that is, as set forth above, by satisfying the § 706 requirements of investigation, reasonable cause finding, and conciliation effort. See, *Horn v. Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982), where the Sixth Circuit held that the EEOC could not proceed as an intervenor on appeal when the private plaintiff had settled the underlying action after being denied class certification. In the *Horn* case, the Court found that the EEOC had never issued a determination of reasonable cause or engaged in conciliation, and therefore concluded that the EEOC was "without an independent jurisdictional basis for litigating here against Eltra." *Id.* at 441. In this case, it is not disputed that the EEOC has never investigated any charge (including Hoffman's) which encompasses any of the

claims it now seeks to litigate, has never made a finding of reasonable cause on any of those claims, and has never attempted to conciliate with any of the Petitioners as to those claims. In these circumstances, the District Court's order holding that the EEOC may independently litigate class claims in this action represents an impermissible expansion of the District Court's statutory jurisdiction which should have been remedied by the issuance of the requested writ of mandamus.[5]

4. The Court of Appeals' statutory interpretation which countenanced the actions by the EEOC in this case raises a significant and recurring issue in the administration of Title VII and its enforcement in the federal courts. Simply put, that issue is whether the EEOC will be allowed to use permissive intervention into individual private Title VII suits as a device for circumventing the statutory requirements imposed on it when it brings a direct suit in its own

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[5] While the final order doctrine is not applicable where review is sought via a petition for mandamus, it should be noted that the decisions of the District Court and the Court of Appeals are, for all practical purposes in this case, "final orders." Thus, the District Court has twice indicated its belief that the challenged procedure is appropriate and, as evidenced by its October 3, 1984 Order (App. D, *infra*, pp. 15a-17a), is now proceeding to try this case on that basis. Similarly, the Court of Appeals, while technically denying issuance of the requested writ on the basis of lack of jurisdiction to do so, reached this holding only after considering the case substantively. Thus, it seems clear that the Court of Appeals would not reach a different conclusion if this matter were to be appealed after entry of a final judgment by the District Court. In these circumstances, there exists no persuasive reason for postponing review of this important issue until after a trial has been completed and the normal appeal process has run its course.

name alleging pattern-and-practice-type claims, and, through that device, rid itself of the apparently distasteful necessity of actually having to investigate, find reasonable cause, and attempt conciliation with respect to such claims. Under the ruling of the Court of Appeals, the EEOC, without having fulfilled the statutorily and judicially mandated prerequisites to its own suit, is empowered to use the unsubstantiated and self-serving allegations made by a single employee in a private Title VII suit as a springboard to bring a federal court action challenging a company's entire personnel system and seeking relief for every employee in the company. Stated somewhat differently, if the position of the Court of Appeals prevails, future federal court litigation by the EEOC will be limited not by the scope of the EEOC's investigative and conciliation efforts, but by the seemingly unlimited scope of the EEOC's litigating zeal. The resulting flood of lengthy and highly complex litigation will, moreover, be a highly unwelcome addition to the already overcrowded federal court dockets.

Furthermore, the procedure approved of by the Court of Appeals will sound the death knell for the EEOC's administrative processes as a viable method for resolving broad based allegations of discrimination, for there will be no incentive for the EEOC to comply with the statutory directives of investigation, reasonable cause finding, and conciliation. Although it is true that there must exist a pre-existing private Title VII action in which the EEOC may intervene for the EEOC to utilize the procedure sanctioned by the Court of Appeals, it is obvious that this precondition is likely to exist, either with or without the

EEOC's contrivance, at any given time for employers of any size.

It is noteworthy that the EEOC has, on numerous occasions in the past, attempted to use intervention as a device for circumventing its administrative duties. In nearly every instance, the EEOC was rebuffed in its attempts, including the one instance where the issue was addressed by a Court of Appeals. *Horn v. Eltra Corporation, supra,* 686 F.2d at 440 (6th Cir. 1982).[6] However, now with the ruling of the Court of Appeals below, the Circuits are effectively divided on the propriety of this circumventing procedure and a troubling precedent has been established which will encourage the EEOC to utilize the procedure even more frequently in future suits.

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[6] *Horn, supra,* differs from the instant case in that there the EEOC attempted to use the device of intervention, not for the purpose of securing class representation, but rather for the purpose of continuing litigation after the private action had been settled. In the following District Court cases, the EEOC likewise was unsuccessful in its attempt to use this device to expand the scope of pending, private litigation: *Bell v. McDermott & Company, Inc., supra*; *Benson v. Little Rock Hilton Inn,* 87 F.R.D. 447 (E.D. Ark. 1980); *Troup v. Piper, Jaffray & Hopwood, Inc.,* 16 FEP Cases (BNA) 1554 (D. Minn. 1975); *National Organization for Women, Inc. v. Minnesota Mining and Manufacturing Co.,* 73 F.R.D. 467 (D. Minn. 1977); *Jones v. Holy Cross Hospital Silver Spring, Inc.,* 64 F.R.D. 586 (D. Md. 1974). *But see, Stuart v. Hewlett-Packard,* 66 F.R.D. 73 (E.D. Mich. 1975), where the EEOC was permitted to pursue class claims upon intervening, but the District Court did not address the issue here presented.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 24, 1984

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-1811

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge
for the District of Kansas,
Respondent,

PHYLLIS WILSON HOFFMAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent and
Real-Parties-in-Interest.

PETITION FOR WRIT OF MANDAMUS

Before DOYLE, McKAY and SEYMOUR, Circuit Judges.

McKAY, Circuit Judge.

This is a petition for a writ of mandamus. The underlying action was commenced by an employee of petitioner, seeking relief from alleged descrimination and seeking certification of a class of females of which she would allegedly be a proper representative.

Nearly a year after the action was commenced, the Equal Employment Opportunity Commission (EEOC or Commission) filed a motion for leave to intervene pursuant to sections 705(g)(6) and 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-4(g)(6) and 2000e-5(f)(1) (1982), and Rule 24(b) of the Federal Rules of Civil Procedure. The Commission sought to obtain relief on behalf of the same group of individuals whom the individual plaintiff had sought to represent as a class representative. In seeking intervention, the Commission certified that the case was of general public importance. 42 U.S.C. § 2000e-5(f)(1).

In 1977, the district court granted the EEOC's motion to intervene, pursuant to Federal Rule of Civil Procedure 24(b)(1) and sections 2000e-4(g)(6) and (f)(1). After an incredible delay of six years (not the fault of the court), the cause and details of which are not relevant to this disposition, the EEOC requested authority to seek relief for the group of individuals identified in the Commission's complaint. Over objection, the trial court permitted the EEOC to seek relief on behalf of the class without following the procedures for class certification set forth in Federal Rules of Civil Procedure 23.

Petitioner seeks mandamus in this court to compel the trial court to follow Rule 23 before letting the Commission represent persons other than the private plaintiff who commenced the action in the first instance and, in the alternative, to compel the court to certify this dispute for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1982).

When the Commission brings the action for discrimination in its own name neither it nor the trial

court is required to comply with Rule 23 in order for the Commission to seek class-wide relief. *General Telephone Co. v. EEOC*, 446 U.S. 318, 323-34 (1980). "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* at 326. In enforcing these suits the EEOC "is not merely a proxy for the victims of discrimination. . . ." *Id.* It follows, as the Supreme Court noted, that its "enforcement suits should not be considered representative actions subject to Rule 23." *Id.*

Petitioner argues that when the EEOC acts not as the initiator of a suit, but as an intervenor, the trial court is without jurisdiction to permit that intervention on behalf of a class without making the EEOC comply with Rule 23. Title VII was amended in 1972 to give the EEOC more meaningful enforcement powers. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-5 (1982)). The relevant portions of the amended section permitting the Commission to intervene in a previously commenced private action has no such limitation. In relevant part, it provides that "[u]pon timely application, the court may, in its discretion, permit the Commission . . . to intervene in . . . civil actions upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1) (1982). In this case, the Commission certified that the case was of general public importance. The trial court, in exercise of its discretion, permitted the intervention. Both the spirit and letter of the statute permitting intervention were satisfied. Not only the language of the statute, but the legislative history, supports the

view that the purpose of intervention is vindication of the general public interest. When Senator Williams introduced the amendment to permit the Commission to intervene, he explained:

> The amendment is to clear up an inconsistency whereby the general counsel of the Commission may bring a civil action for the Commission, but might not be able to protect the *Commission's interest* in a case where [a] private litigant is involved.

118 Cong. R. 4814 (1972) (emphasis added).

From the language of the Act and the legislative history, it is apparent that Congress viewed the Commission's role in suits initiated by it or in which it intervened to serve the identical purpose.

That Congress required the Commission to satisfy certain administrative procedures before initiating a law suit on its own does not require us to find an ambiguity in the plain language of Section 706(f)(1), which permits intervention without requiring the satisfaction of those administrative procedures. It would be a tortured construction to conclude that when intervening, the Commission somehow becomes subject to Rule 23 when in fact the Supreme Court has made clear that the Commission is not subject to Rule 23 when bringing a direct action in the first instance. In the section permitting intervention Congress required only two prerequisites: (1) certification by the Commission that its intervention is in the public interest; and (2) the exercise of discretion by the trial court before permitting intervention. If Congress had meant Rule 23 to be a substitute for the investigative procedure required in a direct ac-

tion, it would have said so. To require compliance with Rule 23 would contradict the plain reasoning and mandate of the Supreme Court in *General Telephone.*

Since the Commission is not required to satisfy the mandate of Rule 23 when it intervenes in a private action, the trial court clearly had jurisdiction to permit intervention on the terms and conditions in this case. As the trial court had jurisdiction to act as it did, we are without jurisdiction to review its action by way of mandamus. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980). The trial court's exercise of discretion in determining whether to permit intervention is not reviewable by writ of mandamus absent a judicial usurpation of power. We find no abuse of that discretion. For the reasons given, we are without jurisdiction to order the trial court to certify the issue here discussed for interlocutory appeal.

The petition for writ of mandamus is dismissed for want of jurisdiction in this court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
Plaintiff,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

Plaintiff filed her complaint in 1976 alleging various acts of sexual discrimination in violation of Title VII of the Civil Rights Act of 1964. Her complaint was brought on behalf of herself and all other persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Early in the case, discovery on the class action issues was stayed pending resolution of certain jurisdictional issues. After numerous delays, those jurisdictional issues were resolved by order of this court dated December 8, 1983. [See *Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463 (D. Kan. 1983)].

Now, years after the filing of the complaint, the parties are in a posture to begin discovery on the class action issues. However, plaintiff and plaintiff-intervenor, the Equal Employment Opportunity Commission [hereinafter EEOC], have proposed an alternative to proceeding under the Rule 23 model in order to expedite the progress of this case. They have filed a joint motion to allow the EEOC to act as representative of the class defined in plaintiff's petition and to seek relief for the class without its certification as class representative and without formal class certification. The court finds that such an order would further the purposes of Title VII, and the order should be granted on the basis alone. The court further finds that such an order would prevent additional unnecessary delays, a result which is also encouraged by the policies of Title VII.

A complaint in a Title VII action against a private employer may be filed either by the EEOC or by an individual plaintiff. 42 U.S.C. § 2000e-5(f). The EEOC may file a complaint only after completion of its administrative process, which includes a finding of reasonable cause to believe there has been discrimination and an effort by the EEOC at conciliation with the defendant. *Id.* A plaintiff other than the EEOC may file an action under Title VII only after receipt of a right-to-sue letter from the EEOC. *Id.* A right-to-sue letter is issued by the EEOC following the completion of its administrative process, or upon request of the complainant after the EEOC has had jurisdiction for one hundred eighty (180) days. *Id.* Although the administrative process of Title VII is intended to encourage the prompt resolution of discrimination claims, often the adminis-

trative process is a time-consuming matter. In fact, by 1977 the EEOC had a back log of 99,000 charges. *EEOC, 17th Annual Report*, at p. 12.

Plaintiff Hoffman herein chose not to await the possible lengthy completion of the EEOC's administrative process. Rather, after the EEOC had considered the matter for the mandatory 180 days, plaintiff requested and received, in accordance with 42 U.S.C. § 2000e-5(f)(1), a right-to-sue letter. After plaintiff filed this private action, the EEOC moved to enter the case as plaintiff-intervenor. Judge O'Connor granted the motion to intervene on September 21, 1977, stating: "The court finds that the EEOC's application for intervention is timely; that intervention will cause, if anything, no more than the ordinary and minimal delay and prejudice that often attends addition of a new party to a lawsuit; that EEOC intervention may be helpful in illuminating the issues herein and expediting resolution of the respective claims of the parties; that the case is one of general public importance; and that the claims of the EEOC involve questions of law and fact common to those of the main action."

The question before the court at this time is whether the EEOC may act as class representative without following the Rule 23 model when it has intervened in an action. The law is now clear that when the EEOC brings an action in its own name pursuant to 42 U.S.C. § 2000e-5, Rule 23 is not applicable. *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, 323 (1980). The law is also clear that if this were purely a private action by the plaintiff, without intervention by the EEOC, plaintiff would be bound by the requirements of Rule 23. *General Tele-*

phone of the Southwest v. Falcon, 457 U.S. 147 (1982).

The essential difference between the EEOC bringing suit in its own name and the EEOC intervening in a suit brought as a private action is that to bring the direct suit the EEOC must complete its administrative process, while to intervene the matter must be certified as "of general public importance." In *General Telephone of the Northwest, supra*, wherein the United States Supreme Court held that Rule 23 did not apply to direct suits brought by the EEOC, the court did not rely on the completion of the administrative process by the EEOC as the basis of its ruling. The court commented that "[t]he purpose of the amendments (1972 amendments allowing direct action by EEOC), plainly enough, was to secure more effective enforcement of Title VII." *General Telephone of the Northwest, supra*, 446 U.S. at 325. Congress perceived that the lack of meaningful enforcement powers by the EEOC was a major flaw in Title VII. *Id.*

In the opinion of this court, Title VII's policy of preventing employment discrimination is served not only when the EEOC brings an enforcement action in its own name, but also when it intervenes in a private action. "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *General Telephone of the Northwest, supra*, 446 U.S. at 326. In actions brought by the EEOC to enforce "class rights, Congress meant to broaden the availability of relief, not to force the Rule 23 procedure to be used. *Id.* at 329. Thus "forcing EEOC civil actions into the Rule 23

model would in many cases distort the Rule as it is commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards but seemingly authorized by § 706(f)(1) [42 U.S.C. § 20003-5(f)(1)]." *Id.* at 329-30.

Further, in the Tenth Circuit, the filing of a private Title VII action cuts off the EEOC's ability to bring suit in its own name based on the private plaintiffs' charge, and relegates the EEOC to intervention in the private suit as its only means of enforcing Title VII. *EEOC v. Continental Oil Co.*, 548 F.2d 88 (10th Cir. 1977). Therefore, allowing the EEOC to act as class representative outside the Rule 23 model is a reasonable method of furthering the purposes of the legislation.

IT IS BY THE COURT THEREFORE ORDERE [sic] that the joint motion of the plaintiff and plaintiff-intervenor for an order allowing the EEOC to act as the class representative without following the Rule 23 model is hereby granted.

DATED: This 11th day of April, 1984, at Kansas City Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
Plaintiff,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on defendants' motion to amend this court's April 11, 1984, order to allow Section 1292(b) certification and to stay further district court proceedings pending appeal.

Section 1292(b), Title 28, United States Code, provides, in part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

> from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

This certification process is narrowly construed, and all three criteria above noted must be met before certification is appropriate.

Defendants allege this court's order of April 11, 1984, in which the Equal Employment Opportunity Commission was allowed to act as representative of the class defined in plaintiff's petition, and to seek relief for the class without its certification as class representative and without formal class certification, meets the first criterion for certification in that it involves a controlling question of law.

The Ninth Circuit, in *In Re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982), noted that Congress did not specifically define what it meant by the word "controlling." The court continued, however, stating, "the legislative history of 1292(b) indicates that this action was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation. *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam); *Milbert v. Bison Laboratories*, 260 F.2d 431, 433-35 (3d Cir. 1958)." The "exceptional circumstances or situation" standard applicable to § 1292(b) was given approval in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The question presented by defendants' motion then is whether or not this court's decision to try this case as a class action without making findings under Rule 23 as to numerosity, commonality, typicality and adequacy of repre-

sentation presents a controlling question of law, *i.e.*, an exceptional circumstance.

Defendants assert the court's order will have a profound effect on the scope of this litigation and the manner in which it is tried, and therefore it presents a controlling question of law. Defendants argue that because of plaintiff's employment history, she might, at best, be only a representative of a very limited class, and if this assertion is in fact found to be correct on appeal after a trial on the merits, the court of appeals would have no choice but to reverse the decision of the court and order it to start anew, beginning with the class certification hearing.

The court has examined the order of April 11, 1984, and finds the order does not expand nor attempt to expand the scope of this litigation. The court further determines that plaintiff is appropriate to represent the class of female applicants for employment at United Telecommunications, Inc. who were never hired. Defendants have not, therefore, presented a controlling question of law and have failed to meet the first criterion necessary for certification of an appeal under § 1292(b).

As the court noted above, failure to meet any of the criteria makes certification of the order inappropriate. Therefore, defendants' motion for § 1292(b) certification of the April 11, 1984, order and for stay pending appeal should be denied.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion for § 1292(b) certification of this court's April 11, 1984, order is hereby denied. IT IS FURTHER ORDERED that

defendants' motion for stay pending appeal is hereby denied.

DATED: This 24th day of May, 1984, at Kansas City, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
Plaintiff,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on the motion of defendants for an order conforming the pleadings to this court's prior rulings, and for an order severing plaintiff Hoffman's individual claim, and setting a trial date.

On April 11, 1984, this court entered an order allowing the Equal Employment Opportunity Commission [hereinafter EEOC] to act as representative of the class defined in plaintiff's complaint and to seek relief for the class without its certification as class representative and without formal class certification pursuant to Rule 23, Federal Rules of Civil Procedure. Defendants sought mandamus in the

United States Court of Appeals for the Tenth Circuit to compel this court to follow Rule 23 before allowing the EEOC to represent persons other than plaintiff, or in the alternative to compel the court to certify the dispute for interlocutory appeal. The petition for writ of mandamus was dismissed for want of jurisdiction. *United Telecommunications Inc. v. Saffels*, —— F.2d —— (No. 84-1811, 8/15/84), *reh. denied* —— F.2d —— (10th Cir. 10/01/84).

In light of the court's April 11, 1984, order, defendants contend that the pleadings of plaintiff and the plaintiff-intervenor should be amended to reflect the respective status of such parties by: (a) striking all class claims from the complaint of plaintiff, and (b) entering an order directing the plaintiff-intervenor to amend the allegations of class discrimination in its complaint to conform to those of plaintiff's complaint.

Plaintiff opposes defendants' motion and claims that she has not abandoned her claims requesting class relief. On this point, the court agrees with defendant that there is no authority to allow plaintiff Hoffman's class claims to be held "in limbo." The purposes of the court's ruling allowing the EEOC to proceed as class representative would not be advanced by allowing plaintiff to retain the option to proceed as class representative. Further, it would not be fair to defendants to require them to prepare their case under such circumstances. Nor would such circumstances lead to the expeditious progress of this already very old case.

Rather than requiring plaintiff and plaintiff-intervenor to amend their pleadings, however, the court shall direct the plaintiff and plaintiff-intervenor

to conform their claims to the rulings of this court at the time of the pre-trial conference and in the court's pre-trial order. The court does not feel the issues are so confused that immediate amendment to the pleadings is necessary. Further, in this court the claims made in the pre-trial order are considered to supersede the pleadings. Therefore, the court shall deny defendants' motion for an order conforming the pleadings to this court's prior rulings in this case.

As to defendants' motion to sever plaintiff Hoffman's individual claim and to set a trial date, the court finds that such an action by the court at this time would be premature. Plaintiff has individual claims and is also a member of the class whose interests are being protected by the plaintiff-intervenor. Following the entry of the pre-trial order in this case, the propriety or impropriety of severing plaintiff Hoffman's individual claims may be more easily ascertained by this court.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion for an order conforming the pleadings to this court's prior rulings in this case is hereby denied. IT IS FURTHER ORDERED that defendants' motion to sever plaintiff Hoffman's individual claim and to set a trial date is hereby denied.

DATED: This 3rd day of October, 1984, at Kansas City, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

APPENDIX E

SEPTEMBER TERM—September 28, 1984

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable Stephanie K. Seymour, Circuit Judges.

No. 84-1811

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge
for the District of Kansas,
Respondent,

PHYLLIS WILSON HOFFMAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Real-Parties-In-Interest.

This matter comes on for consideration of petitioners' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Doyle, McKay and Seymour, to whom the cause was argued and submitted.

The petition for rehearing having been denied by the panel to whom the cause was argued and submitted, and no member of the panel nor judge in regular service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Judge James K. Logan did not participate.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX F

1. The relevant provisions of Sections 705, 706, and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-4, § 2000e-5, and § 2000e-6, are as follows:

Sec. 705(g)

The Commission shall have power—

* * * *

(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

* * * *

Sec. 706(b)

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. * * * If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it

shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, concilation, and persuasion.

* * * *

Sec. 706(f)

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. * * * If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General

in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. * * * Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * * *

Sec. 707(e)

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

2. The relevant provisions of Rule 23, Federal Rules of Civil Procedure, are as follows:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

* * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
12216 West 79th Terrace,
Lenexa, Kansas 66215, on
behalf of herself and all other
persons similarly situated,

Plaintiff,

v.

UNITED TELECOMMUNICATIONS, INC.,
a Kansas corporation,
2330 Johnson Drive
Westwood, Kansas,
together with its subsidiaries and affiliates
in the United Telephone System:

United System Service, Inc.

Carolina Telephone & Telegraph Company

United Telephone Company of Ohio

Midwest Group:
- Capital City Telephone Company
- United Telephone Company of Iowa
- United Telephone Company of Kansas, Inc.
- United Telephone Company of Minnesota (Pioneer United)
- United Telephone Company of Missouri
- United Telephone Company of Arkansas
- Midstate Telephone Company
- United Telephone Company of the West

United Telephone Company of Florida

Northwest Group:
- United Telephone Company of the Northwest
- California-Oregon Telephone Company
- East Peninsula Telephone Company

Florida Telephone Corporation

Eastern Group:
- New Jersey Telephone Company
- United Telephone Company of Pennsylvania (Peoples)

Gulf States-United Telephone Company (Palestine & Navasota merged into)

Palo Pinto Telephone Company, Inc.

United Telephone Company of Indiana, Inc.

United Telephone Company of Michigan (Augusta)

Southeast Group:
- United Inter-Mountain Telephone Company
- United Telephone Company of the Carolinas, Inc.

Keller Telephone Company

Alexandria Telephone Cable Company

Blacktown Telephone Company (Subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania)

Non-Telephone:
- North Electric Company
- ULI Leasing, Incorporated
- North Electric Company Supply Division
- Rixon Electronics, Inc.
- United Computing Systems, Inc.
- UCS, Ind.

United Business Communications
Central Kansas Power Company, Inc.
United System Service, Inc.
National Datacenter
CITCOM, Inc.
National Laboratory of Urban Communications, Inc.
The Citizens Ice Company

and any other subsidiaries and affiliates not specifically set out,

SERVE:

Registered agent for United Telecommunications, Inc., P.H. Henson, 2330 Johnson Drive, Westwood, Kansas 66205;
and

UNITED SYSTEM SERVICE, INC.,
A Kansas Corporation,

SERVE:

Paul H. Henson, 2330 Johnson Drive, Westwood, Shawnee Mission, Kansas 66205,

Defendants.

COMPLAINT

I.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, 42 U.S.C. § 2000e-5(f) as amended, and 28 U.S.C. § 2201 and 2202, giving the Federal District Court original jurisdic-

tion of civil actions to recover damages and to secure redress by way of equitable and other relief for deprivation of civil and constitutional rights. This is a suit authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The jursdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by 42 U.S.C. § 2000e et seq., providing for injunctive and other relief against sex discrimination in employment.

II.

VENUE

Unlawful employment practices complained of herein were and are being committed within the jurisdiction of the United States District Court for the District of Kansas.

III.

ALLEGATIONS REGARDING CLASS ACTION

A. Plaintiff Phyllis Wilson Hoffman brings this action on behalf of herself and all other persons similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class which plaintiff represents is composed of all females who are, were, or might be employed by the defendants in managerial or professional positions at its headquarters in Westwood, Kansas, and at all offices of its subsidiaries and affiliates, and who have been or continue to be or might be adversely affected by the practices complained of herein.

B. There are common questions of law and fact affecting the rights of members of the class who are, were or continue to be limited, classified and dis-

criminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of their sex. These persons are so numerous that joinder of all members is impractical. A common relief is sought. The interest of said class is adequately represented by the plaintiff herein and the claims of the named plaintiff are typical of the claims of the class. Defendants have acted or refused to act on grounds generally applicable to the class.

IV.

NATURE OF PROCEEDING

A. This is a proceeding for a declaratory judgment as to the rights of the plaintiff and the class she represents and for a preliminary and permanent injunction restraining defendants from maintaining a policy, practice, custom or usage of:

(1) Discriminating against plaintiff and other persons in the class she represents because of sex with respect to compensation, terms, conditions and privileges of employment.

(2) Limiting, segregating and classifying employees and applicants for employment of defendants in ways which deprive or tend to deprive plaintiff and other persons in the class she represents of equal employment opportunities and otherwise adversely affect their status as employees because of their sex.

B. Plaintiff and the class she represents also seek back pay, damages, and attorneys fees for the violations of their rights as alleged herein.

V.

PARTIES

A. Plaintiffs Phyllis Wilson Hoffman is a Caucasian female citizen of the United States and a resident of the State of Kansas, residing at 12216 West 79th Terrace, Lenexa, Kansas. Plaintiff Phyllis Wilson Hoffman was employed by Defendant United System Service, Inc., and United Telecommunications, Inc. as part of the United Telephone System at its office in Westwood, Kansas. Defendant United System Service, Inc. terminated plaintiff Phyllis Wilson Hoffman's employment with the company on May 9, 1975.

B. Defendant United Telecommunications, Inc. is and has been at all times material to this action a corporation organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of Kansas and the City of Westwood, Kansas. Said defendant company operates and maintains an office and is an employer within the meaning of 42 U.S.C. § 2000e in that at all times material to this action said defendant company has been engaged in an industry affecting commerce, has employed at least 50 persons for each working day in each of 20 or more calendar weeks for each year, and has been engaged in the manufacture and production of products for interstate commerce within the meaning of the Act.

Defendant United Telecommunications, Inc. is a holding company which operates, administers and controls the United Telephone System which comprises the following subsidiaries and affiliates: United System Service, Inc.; Carolina Telephone & Telegraph Company; United Telephone Company of

Ohio; Midwest Group which includes Capital City Telephone Company, United Telephone Company of Iowa, United Telephone Company of Kansas, Inc., United Telephone Company of Minnesota (Pioneer United), United Telephone Company of Missouri, United Telephone Company of Arkansas, Midstate Telephone Company, and United Telephone Company of the West; United Telephone Company of Florida; Northwest Group which includes United Telephone Company of the Northwest, California-Oregon Telephone Company, and East Peninsula Telephone Company; Florida Telephone Corporation; Eastern Group which includes New Jersey Telephone Company, United Telephone Company of Pennsylvania (Peoples), and New Jersey Telephone Company; Gulf States-United Telephone Company (Palestine & Navasota merged into); Palo Pinto Telephone Company, Inc.; United Telephone Company of Indiana, Ind.; United Telephone Company of Michigan (Augusta); Southeast Group which includes United Inter-Mountain Telephone Company, and United Telephone Company of the Carolinas; Inc.; Keller Telephone Company; Alexandria Telephone Cable Company; Blacktown Telephone Company (subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania); and Non-Telephone subsidiaries and affiliates including North Electric Company; ULI Leasing, Incorporated; North Electric Company Supply Division; Rixon Electronics, Inc.; United Computing Systems, Inc.; UCS, Inc.; United Business Communications; Central Kansas Power Company, Inc.; United Systems Service, Inc.; National Datacenter; CITCOM, Inc.; National Laboratory of Urban Communications, Inc.; and the Citizens Ice Company.

Defendant United Telecommunications, Inc. exercises substantial and direct control over these subsidiaries and affiliates in that it developes and disseminates system-wide personnel policy which must be followed by each company; it reviews the operating costs of each subsidiary and affiliate company monthly at its headquarters in Westwood, Kansas, and determines and approves the operating budgets of each subsidiary and affiliate; it administers all retirement and pension funds for employees of all subsidiaries and affiliates at its headquarters in Westwood, Kansas; it processes the payroll of employees at its headquarters in Westwood, Kansas, for certain of its subsidiaries and affiliates, including those in the "Midwest Group"; the officers and/or directors of United Telecommunications, Inc. serve as members of the Board of Directors and sometimes as officers of all the subsidiaries and affiliate companies.

C. Defendant United System Service, Inc. is and has been at all times material to this action a corporation and existing under and by virtue of the laws of the State of Kansas and doing business in the State of Kansas and the City of Westwood, Kansas. Said defendant company operates and maintains an office and is an employer within the meaning of 42 U.S.C. § 2000e in that at all times material to this action said defendant company has been engaged in an industry affecting commerce, has employed at least 50 persons for each working day in each of 20 or more calendar weeks for each year, and has been engaged in the manufacture and production of products for interstate commerce within the meaning of the Act.

Defendant United System Service, Inc. is a subsidiary of United Telecommunications, Inc. and part of the United Telephone System and is the branch of

that system which directly employed the plaintiff Phyllis Wilson Hoffman. At all times mentioned herein defendant United System Service, Inc. has been acting under practices, policies and procedures established by its parent corporation United Telecommunications, Inc. especially with regard to personnel policies, so that whatever actions were taken by defendant United Systems Service, Inc. are attributable to defendant United Telecommunications, Inc. All acts alleged herein as committed by defendant United Systems Service, Inc. should be imputed as having also been the acts of defendant United Telecommunications, Inc.

VI.

ADMINISTRATIVE PROCEDURES

A. On July 23, 1975, within 90 days of the occurrence of the continuing acts of which she complains, plaintiff Phyllis Wilson Hoffman, a Caucasian female employee of the defendant United System Service, Inc. and United Telecommunications, Inc. filed written charges, under oath, with the Equal Employment Opportunity Commission and with the Kansas Commission on Civil Rights, alleging denial by defendants United System Service, Inc. and United Telecommunications, Inc. of rights of plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended. Copies of said charge are attached hereto and made a part hereof and marked as plaintiff's Exhibits A and B.

B. On September 27, 1975, the Equal Employment Opportunity Commission assumed jurisdiction of said charges after the sixty (60) day deferral period for

the Kansas Commission on Civil Rights to seek relief for plaintiff expired.

C. On or about August 10, 1976, the Equal Employment Opportunity Commission advised plaintiff that the Commission had not filed a civil action with respect to plaintiff's charges as provided by Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et seq.; and that the plaintiff was entitled to institute a civil action in the appropriate Federal District Court within ninety (90) days of receipt of said letter. A copy of said "Notice of Right to Sue within 90 Days" is attached hereto and made a part hereof and marked as plaintiff's Exhibit C.

D. Plaintiff has, therefore, filed this action within said 90 days.

VII.

STATEMENT OF CLAIM

A. The discriminatory practices instituted and/or maintained by the defendants include, but are not limited to, the following acts made unlawful by § 703 and § 704 of Title VII of the Civil Rights Act of 1964, as amended:

1. Establishing job classifications segregated on the basis of sex;

2. Establishing promotional systems segregated on the basis of sex;

3. Failing to recruit and hire women into certain job categories, especially those above grade 13, because of their sex;

4. Maintaining policies and practices with respect to job assignments, transfer, promotion

and other terms and conditions of employment which unlawfully operate to deny equal opportunities to women because of their sex;

5. Failing to transfer and promote females to professional and managerial positions because of their sex;

6. Paying women in professional and managerial positions less than men doing substantially similar work;

7. Placing men in job classifications with extensive responsibility whereas women are allocated job classifications with responsibility levels below their capabilities;

8. Excluding women from management development programs within and outside the company;

9. Using an obscure and informal procedure for promotion to management and professional level positions whereby women are effectively kept from access to such positions;

10. Excluding females from employment based on characteristics generally attributable to women rather than on the basis of individual capabilities so as to create unreasonable obstacles to the advancement by females;

11. Failing and refusing to take reasonable steps to eliminate the effects of its previous policies and practices of discrimination on the basis of sex.

B. 1. Plaintiff was hired by defendant United System Service, Inc. on February 14, 1972, in its Industrial Relations Department.

2. Plaintiff duly commenced her work and performed her duties in a highly competent manner during her tenure with defendant.

3. During the period of her employment with defendant, plaintiff was frequently given indications that her work was performed in a satisfactory manner.

4. During the three years of plaintiff's employment with defendant, she had a good attendance record.

5. During the period of plaintiff's tenure with defendant she was consistently subjected to the effects of defendant's policies and practices of discrimination based on sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, including:

a. Plaintiff was hired into a position with lower pay and less responsibility than her qualifications and experience warranted; though later given a "promotion", her salary in the "promotion was below the minimum company salary level for her grade and she had

b. Plaintiff was allowed fewer training and advancement opportunities than males in her department with similar education, tenure and experience;

c. Plaintiff's "promotions" did not include salary increments and responsibility levels commensurate with promotions given to males within her department;

d. Defendant conducted a series of reorganizations of the department in which

plaintiff worked in which job classifications were redefined and responsibilities reallocated in such a way as to effectively reduce plaintiff's responsibilities and limit her opportunity for promotion while assuring higher pay and responsibilities for males in similar jobs within the department;

e. Plaintiff was inadequately advised of all details of promotional opportunities available to her within other subsidiaries of the United Telephone System which prevented her access to said promotions;

6. Plaintiff actively worked both within and outside the company to promote equal employment opportunities for women. Although such activities were originally assigned to her as part of her job responsibilities, she was later advised that pursuing same too aggressively would jeopardize her opportunity to advance within the company;

7. Plaintiff's protestation to her superiors that her own pay level and promotional opportunities were far below males with similar qualifications resulted in token corrective measures and warnings that her efforts to assure equal treatment would inhibit her advancement;

8. As a result of defendant's discrimination of her, plaintiff suffered emotional distress;

9. Defendant's policy of discrimination of plaintiff and harrassment because of her support of Title VII culminated in plaintiff's being summarily terminated from her job on May 9, 1975, without justification;

C. The effect, purpose and intent of the above policies and practices which defendants have pursued and are pursuing has been and continues to limit, segregate, classify, and discriminate against plaintiff female workers similarly situated throughout the United Telephone System in ways which jeopardize the jobs of and tend to deprive the said female workers of employment opportunities and otherwise adversely affect their status as employees because of their sex.

VIII.

PRAYER FOR RELIEF

A. Plaintiff and the class she represents are qualified for hiring, promotions, and transfers.

B. Plaintiff and the class she represents are now suffering and will continue to suffer from the defendants' policies, practices, customs and usages set forth herein.

C. Plaintiff and the class she represents have been and are being deprived of income in the form of wages and of prospective retirement benefits, social security and other benefits due to them as workers, solely because of their sex, in a sum to be proven at trial.

D. Since the time of her discharge on May 9, 1975, named plaintiff has been able to find only temporary employment. Plaintiff alleges that her inability to obtain further employment is a direct result of defendants' discrimination of her.

E. Plaintiff and the class she represents are entitled to have the actions herein alleged permanently enjoined because they have no plain, adequate, or complete remedy at law to redress these wrongs and are now suffering and will continue to suffer ir-

reparable injury from the defendants' policies, practices and customs as set forth herein, and an injunction is the only means of securing adequate relief.

F. Plaintiff and the class she represents are entitled to receive compensatory damages for lost wages and emotional distress resulting from the discrimination by defendants.

G. Plaintiff and the class she represents are entitled to reasonable attorneys' fees and their costs herein.

H. Plaintiff is entitled to reinstatement with the defendant at a position commensurate with her ability, education and experience.

WHEREFORE, plaintiff respectfully prays this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant a preliminary and permanent injunction enjoining the defendants and their officers, agents, successors, employees, attorneys, other representatives and those acting in concert with them and/or at their direction, enjoining them from continuing or maintaining any acts, policy, practice, custom or usage which discriminates against plaintiff, members of the class she represents, and any employee or applicant for employment, on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 53 U.S.C. § 2000e et seq., as amended, including policies, practices, customs and usages herein alleged.

2. Order defendants to grant plaintiff and the class she represents back pay from the appropriate

date for each in the amount of the difference between the wages they actually earned and the highest wages they would have earned absent the illegal discrimination against them by defendants, such back pay to include reimbursement for any possible overtime compensation, normal pay increases and fringe benefits including lost payments to pension funds and social security, all plus interest, and any other relief necessary to make whole all persons who have been adversely affected by the discriminatory policies and practices described herein and any further relief as the Court deems just and equitable.

3. Grant a preliminary injunction ordering defendants to grant plaintiff and all members of the class she represents reinstatement, where necessary, and the promotions they would have been entitled to but for defendants' illegal discrimination against them and order defendants to grant them the highest paying job systemwide to which they would be entitled absent defendants' illegal discrimination against them.

4. Due to the defendants' willful violation of the individual and class plaintiffs' rights, and the intentional discrimination against them, award plaintiff and the class she represents, by way of example, punitive damages in the amount of One Million Dollars ($1,000,000.00) against defendants.

5. Award plaintiff and the class she represents damages for their psychic losses, emotional distress, humiliation and severe mental anguish suffered as a result of defendants' discrimination against them in amount of Fifty Thousand Dollars ($50,000.00) for the plaintiff and each member of the class she represents.

6. Order defendants to institute and carry out such other policies, practices, and affirmative action programs which assure equal employment opportunities for females so as to eradicate the effects of defendants' past and present unlawful employment practices.

7. Allow plaintiff and the class she represents their costs herein and reasonable attorneys' fees.

8. Grant such additional relief as to the Court seems just, proper, and equitable.

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[Exhibits Deleted]

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN, *et al.*,
Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

INTERVENOR'S COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343, and 1345. This is an action authorized and instituted pursuant to Sections 705(g)(6) and 706(f)(1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq. (Supp. V, 1975), (hereinafter referred to as Title VII).

2. The unlawful employment practices alleged below were and are now being committed within the State of Kansas and the judicial District of Kansas.

PARTIES

3. Intervenor, Equal Employment Opportunity Commission (hereinafter the "EEOC" or "Commis-

sion") is an agency of the United States charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to intervene in this action by Section 705(g)(6) and Section 706(f)(1) of Title VII.

4. Plaintiff Phyllis Wilson Hoffman is a female citizen of the United States and a resident of the State of Kansas. Plaintiff was employed by Defendant United System Service, Inc., and United Telecommunications, Inc., as part of the United Telephone System at its office in Westwood, Kansas. Defendant United System Service, Inc., terminated plaintiff Phyllis Wilson Hoffman's employment on May 9, 1975.

5. Since at least July 2, 1965, Defendant United Telecommunications, Inc., (hereinafter, "UTI") has continuously been and is now a Kansas corporation doing business in the State of Kansas and City of Westwood, Kansas. UTI utilizes materials and supplies which have crossed state lines. UTI has continuously employed and does now employ more than fifteen (15) persons.

Defendant UTI is a holding company which operates, administers and controls the United Telephone System which comprises the following subsidiaries and affiliates: United System Service, Inc.; Carolina Telephone & Telegraph Company; United Telephone Company of Ohio; Midwest Group which includes Capital City Telephone Company, United Telephone Company of Iowa; United Telephone Company of Kansas, Inc., United Telephone Company of Minnesota (Pioneer United), United Telephone Company of Missouri, United Telephone Company of Arkansas, Midstate Telephone Company, and United Telephone

Company of the West; United Telephone Company of Florida; Northwest Group which includes United Telephone Company of the Northwest, California-Oregon Telephone Company, and East Peninsula Telephone Company; Florida Telephone Corporation; Eastern Group which includes New Jersey Telephone Company, United Telephone Company of Pennsylvania (Peoples), and New Jersey Telephone Company; Gulf States-United Telephone Company (Palestine & Navasota merged into); Palo Pinto Telephone Company, Inc.; United Telephone Company of Indiana, Inc.; United Telephone Company of Michigan (Augusta); Southeast Group which includes United Inter-Mountain Telephone Company, and United Telephone Company of the Carolinas, Inc.; Keller Telephone Company; Alexandria Telephone Cable Company; Blacktown Telephone Company (subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania); and Non-Telephone subsidiaries and affiliates including North Electric Company; ULI Leasing, Incorporated; North Electric Company Supply Division; Rixon Electronics, Inc.; United Computing Systems, Inc.; UCS, Inc.; United Business Communications; Central Kansas Power Company, Inc.; United System Service, Inc.; National Datacenter; CITCOM, Inc.; National Labortory of Urban Communications, Inc.; and the Citizens Ice Company.

Defendant United System Service, Inc., (hereinafter, "USSI") has continuously been and is now a Kansas corporation doing business in the State of Kansas and City of Westwood, Kansas. USSI utilizes materials and supplies which have crossed state lines. USSI has continuously employed and does now employ more than fifteen (15) persons.

Defendant USSI is a subsidiary of UTI and part of the United Telephone System and is the branch of that system which directly employed the plaintiff Phyllis Wilson Hoffman. At all times mentioned herein defendant USSI has been acting under practices, policies and procedures established by its parent corporation UTI especially with regard to personnel policies, so that whatever actions were taken by defendant USSI are attributable to defendant UTI. All acts alleged herein as committed by defendant USSI should be imputed as having also been the acts of defendant UTI.

6. Since at least July 2, 1965, the defendants listed above have continuously been and are now employers in an industry affecting commerce within the meaning of Section 701(b), (g), and (h) of Title VII.

7. Within three hundred (300) days of the occurrence of the acts of which plaintiff complains a charge was filed with the Commission alleging that the defendants had engaged in unlawful employment practices under Title VII.

8. Pursuant to plaintiff's request, the Commission advised her by letter that she was entitled to institute a civil action in the appropriate United States District Court within ninety (90) days of receipt of said letter. This action was instituted within that time period.

STATEMENT OF CLAIM

9. Since at least July 2, 1965, and continuously until the present time, the defendants have intentionally engaged in unlawful employment practices in violation of Section 703(a) of Title VII, which include but are not limited to the following:

a. Maintaining a system of recruitment and hiring into professional and managerial positions which discriminates against women because of their sex;

b. Maintaining a system of job classification which discriminates against professional and managerial women because of their sex;

c. Failure to promote female employees into professional and managerial positions because of their sex;

d. Discriminating against female professional and managerial employees with respect to their compensation because of their sex;

e. Conducting professional and managerial training programs which discriminate against women because of their sex;

f. Discriminating against professional and managerial female employees because of their sex with respect to discharge and other terms and conditions of employment.

10. The effect of the policies and practices complained of in Paragraph 9 above has been to deprive women of equal employment opportunities and otherwise to affect their status as employees because of their sex.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining the defendants, their officers, agents, employees, succcessors, assigns and all persons in active concert or par-

ticipation with them from engaging in any employment practice with discriminates because of sex.

B. Order the defendants to institute and carry out policies, practices, and affirmative action programs which provide equal employment opportunities for women and which eradicate the effects of the defendants' past and present unlawful employment practices.

C. Order the defendants to make whole those persons adversely affected by the unlawful employment practices described above, by providing appropriate back pay with interest, in an amount to be proved at trial, and other affirmative relief necessary to eradicate the effects of the defendants' unlawful employment practices.

D. Grant such further relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 76-223-C2

PHYLLIS WILSON HOFFMAN, *et al.*,
Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant for Intervention,
vs.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

EEOC MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

The claims raised by the Plaintiff in this case arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, as amended, *et seq.* (Supp. V, 1975) hereinafter cited as "Title VII." The Applicant for Intervention, Equal Employment Opportunity Commission ("EEOC" or "Commission"), is the agency of the United States established and empowered by Congress to interpret and enforce that Title. Sections 705(g)(6) and 706(f)(1) of Title VII, 42 U.S.C. Sections 2000e-(4)(g)(6) and (5)(f)(1) give the Commission authority to intervene in private actions brought under the Title to secure en-

forcement of employment rights protected by Title VII.

The Commission's right to intervene is the conditional right created by a statute of the United States referred to in Rule 24(b)(1) of the Federal Rules of Civil Procedure. That right is conditioned by two statutory requirements: that the Commission's application be timely and that the Commission certify that this action is one of general public importance.

The Commission motion to intervene is timely. Although plaintiffs' complaint was filed on November 5, 1976, the class has not yet been certified. Discovery has not yet been completed. Discovery being a critical and time-consuming aspect of most Title VII cases, the EEOC's participation at this juncture in the litigation could prove of assistance to the Court in the complilation and analysis of statistical data. The EEOC could also assist in the class delineation. The mere passage of time since the original complaint does not make the EEOC's motion untimely. Rather, timeliness is an issue which depends upon whether the case has progressed through significant stages of the litigation process. *Diaz* v. *Southern Drilling Corporation*, 427 F.2d 1118 (5th Cir. 1970); *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Co.*, 420 F.2d 1103 (5th Cir. 1970); *McDonald* v. *E.J. Lavino*, 430 F.2d 1065 (5th Cir. 1970); *Layne-New York Company* v. *Allied Asphalt Company*, 53 F.R.D. 529 (W.D. Pa. 1971); 3B *Moore's Federal Practice* 2d para. 24.13. See also *Iowa State University Research Foundation Inc.* v. *Honeywell, Inc.*, 459 F.2d 447 (8th Cir. 1972). In the instant case, only preliminary matters have been resolved; hence the EEOC's motion to intervene is in all respects timely.

Furthermore, by certificate which accompanies its motion, the Commission has certified that this case is one of general public importance. This action involves issues relating to the employment of women in higher level positions, issues which have received relatively little treatment from the courts. The Court will be faced with difficult issues revolving around subjective evaluations and personal factors of personnel decisions in professional and managerial jobs. The EEOC can assist the Court in these decisions. Also, the defendant is a large and visible employer, particularly in the Midwest and South, whose employment practices have an impact on the communications industry as a whole. Hence it is important that discrimination be eliminated from the employment practices of this company.

Rule 24(b)(1) Fed. R. Civ. P. requires that intervention shall not unduly delay or prejudice the original action. In its proposed complaint which accompanied the motion to intervene, the Commission makes allegations of unlawful practices which are substantially the same as those made by the plaintiff in her complaint. Both pleadings allege that the defendant has engaged in sex discrimination in the areas of hiring, recruitment, job classification, promotion, wages, training, and discharge. Thus the scope of the Commission's participation in the action is intended to be no greater than the scope of claims raised in plaintiff's complaint. Since no new claims are raised by the Commission, the proposed intervention cannot be deemed to depart form the "field of litigation" established by the original parties. See *In Re Willacy County Water Control and Improvement District*, 36 F. Supp. 36, 38 (S.D. Texas 1940).

EEOC intervention should cause no delay or duplication of efforts since the Commission will cooperate with plaintiff's counsel and coordinate all efforts toward discovery and trial preparation. There will be no delay in the discovery process since information necessary for plaintiff's case is nearly identical to that needed by the EEOC. The Commission will have no need to reopen matters already heard and decided by the Court.

Moreover, Commission participation in this case should help to expedite, rather than delay the proceedings. Because of its expertise and resources, the EEOC will be able to aid the Court and the parties in conducting discovery and formulating remedies which will eliminate discriminatory employment practices and provide relief to the victims of the unlawful practices. In this manner, the Commission can be instrumental in moving the action toward a swift but just conclusion.

Although the claims of EEOC and the plaintiff are virtually identical, the Commission seeks to intervene in this case in the public interest, which is the government's concern that this action for the enforcement of public rights be properly and effectively prosecuted. In furtherance of this governmental concern the EEOC, if intervention is permitted, will ensure that the evidence is fully developed and the legal issues clarified so that the Court can decide the issues on the best possible record.

The Commission, as the agency charged with the administration, interpretation and enforcement of Title VII, should be permitted to intervene in this action to ensure that the public interest in the elimination of discrimination is represented by more than

private interests, even where similar substantive claims are advanced by both the public and private complainants. See *Securities & Exchange Commission* v. *U.S. Realty and Improvement Co.*, 310 U.S. 434 (1940); *All American Airways, Inc.* v. *Cedarhurst*, 201 F.2d 273 (2d Cir. 1953); *United States* v. *Local 638, Enterprise Association*, 347 F. Supp. 164 (S.D.N.Y. 1972). As other courts have noted, the Commission, because of its unique expertise in Title VII law, would as intervenor be particularly able to assist materially in the adjudication of this case. *Thornton* v. *East Texas Motor Freight, Inc.*, 454 F.2d 197 (6th Cir. 1972); *Marshall* v. *Electric Hose and Rubber Co.*, 10 FEP cases 1071 (D.Del. 1974); *Sobel* v. *Yeshiva University*, No. 75-Civ. 2232 (GLG) (S.D.N.Y., filed May 31, 1977).

For the reasons stated above, the Commission urges that its Motion to Intervene be granted.

Respectfully submitted,

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EARL HARPER, JR.
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No. 84-1002

Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., et al.,
Petitioners,

vs.

DALE E. SAFFELS, United States District Judge for the District of Kansas,
Respondent,

PHYLLIS WILSON HOFFMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents and Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT PHYLLIS WILSON HOFFMAN IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may seek relief for individuals in addition to the private plaintiff when it intervenes permissively in a private Title VII class action pursuant to Section 706(f)(1) of the Civil Rights Act of 1964, as amended.

LIST OF PARTIES

Parties to the proceedings in the United States Court of Appeals for the Tenth Circuit were: Phyllis Wilson Hoffman; The Honorable Dale E. Saffels, United States District Judge for the District of Kansas; the Equal Employment Opportunity Commission; and United Telecommunications, Inc., and the following of its subsidiaries:

United System Service, Inc.
Carolina Telephone & Telegraph Company
United Telephone Company of Ohio
Capital City Telephone Company
United Telephone Company of Iowa
United Telephone Company of Kansas, Inc.
United Telephone Company of Minnesota (Pioneer United)
United Telephone Company of Missouri
United Telephone Company of Arkansas
Mid-State Telephone Company
United Telephone Company of Florida
United Telephone Company of the Northwest
California-Oregon Telephone Company
East Peninsula Telephone Company
Florida Telephone Corporation
New Jersey Telephone Company
United Telephone Company of Pennsylvania (Peoples)
Gulf States-United Telephone Company (Palestine & Navasoto merged into)
Palo Pinto Telephone Company, Inc.
United Telephone Company of Indiana, Inc.
United Telephone Company of Michigan (Augusta)

United Inter-Mountain Telephone Company
United Telephone Company of the Carolinas, Inc.
Keller Telephone Company
Alexandria Telephone Cable Company
Blacktown Telephone Company (Subsidiary of United Telecommunications, Inc. operated by United Telephone Company of Pennsylvania)
North Electric Company
ULI Leasing, Incorporated
North Electric Company Supply Division
Rixon Electronics, Inc.
United Computing Systems, Inc.
UCS, Inc.
United Business Communications
Central Kansas Power Company, Inc.
National Datacenter
CITICOM, Inc.
National Laboratory of Urban Communications, Inc.
The Citizens Ice Company

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No. 84-1002

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., et al.,
Petitioners,

vs.

DALE E. SAFFELS, United States District Judge for the District of Kansas,
Respondent,

PHYLLIS WILSON HOFFMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents and Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT PHYLLIS WILSON HOFFMAN IN OPPOSITION

OPINIONS BELOW

The April 11, 1984, Memorandum and Order of the District Court is unreported. It is reproduced at Appendix B, pp. 6a-10a, of the Petition. The opinion of the Court of Appeals for the Tenth Circuit is reported at 741 F.2d 312 (10th Cir. 1984).

STATEMENT OF THE CASE

On November 5, 1976, Phyllis Wilson Hoffman filed this suit in the United States District Court for the District of Kansas on behalf of herself and all other persons similarly situated against United Telecommunications, Inc. and 38 of its subsidiaries. She alleged that defendants had discriminated against her and all other members of the class she represents on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* *See* Pet. A. 25a-41a.[1] Hoffman had complied with all statutory prerequisites to her suit. See Resp. A. A1-A4. On June 30, 1977, the Equal Employment Opportunity Commission ("EEOC") filed a Certificate of General Public Importance, Resp. A. A5, and moved to intervene in Hoffman's action. *See* Pet. A. 42a-54a. On September 21, 1977, the District Court granted EEOC's motion.[2]

After defendants resisted discovery and jurisdiction for over seven years, on December 8, 1983, the District Court entered an order upholding personal jurisdiction

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1. References to "Pet. A." refer to the appendices attached to the Petition for Writ of Certiorari. References to "Resp. A." refer to the appendices attached to this Brief in Opposition.

2. The District Court's order stated:

> The court finds that the EEOC's application for intervention is timely; that intervention will cause, if anything, no more than the ordinary and minimal delay and prejudice that often attends addition of a new party to a lawsuit; that EEOC intervention may be helpful in illuminating the issues herein and expediting resolution of the respective claims of the parties; *that the case is one of general public importance;* and that the claims of the EEOC involve questions of law and fact common to those of the main action. Accordingly, the EEOC's motion to intervene shall be sustained and the clerk is hereby directed to file the intervenor's complaint. (Emphasis supplied.)

over all defendants. 575 F.Supp. 1463 (D. Kan. 1983). On January 27, 1984, Hoffman and EEOC filed a joint Motion to Deem EEOC as Representative of the Class described in Hoffman's complaint. Their reasons for the motion were to "expedite this matter by avoiding the discovery and hearings necessary to obtain a determination pursuant to Rule 23 of the Federal Rules of Civil Procedure." Memorandum in Support of Plaintiff and Plaintiff-Intervenor's Motion to Deem EEOC as Representative of the Class at 4-5. Since EEOC had been permitted to intervene for all purposes and since the scope of the litigation was not being enlarged, the parties hoped to move the case along by preventing further delay on purely procedural matters. On April 11, 1984, the District Court granted the joint motion. On June 8, 1984, defendants petitioned the United States Court of Appeals for the Tenth Circuit for a writ of mandamus. On August 7, 1974, the Court of Appeals dismissed defendants' petition for want of jurisdiction.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari mischaracterizes the issue involved in the Tenth Circuit's opinion and accordingly misstates the applicable law. This case is a private Title VII class action in which the District Court has permitted EEOC to intervene pursuant to Section 706 (f) (1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) (1). EEOC met the only statutory prerequisite to intervention when it filed a certificate of general public importance. Resp. A. A5. EEOC is now entitled to fulfill its role, recognized by this Court, of acting in the public interest in preventing and remedying employment discrimination. This may include seeking relief for individuals other than the charging party. Neither

the statute, the legislative history, nor the decisions of this Court require the completion of any further administrative procedures. The prerequisites that petitioners would have this Court apply would be meaningless at this point in the litigation, and, in any event, they have no logical relationship to the form of relief sought. As discussed below, petitioners have failed to present any "special and important reasons" justifying review by this Court. Supreme Court Rule 17.1.

The writ should also be denied because mandamus is not appropriate in this case. The Petition is a blatant attempt to avoid the command of the final decision rule and should be rejected.

ARGUMENT

I. The District Court's Order of April 11, 1984, Is Totally Consistent With the Plain Meaning and Purpose of Section 706(f)(1).

A. Only the Intervention Provisions of the Statute Apply to This Case.

Petitioners mislead this Court by their constant attempts to characterize this action as a direct suit by EEOC. Petitioners insist on describing this case as if it were two separate Title VII proceedings, one filed by respondent Hoffman, and one filed by EEOC, which were consolidated for discovery and trial. Thus, the entire basis for the Petition is petitioners' insistence that this proceeding is defective because EEOC has not complied with those provisions of § 706 that contain the prerequisites to direct suit by EEOC. This is not, however, a consolidated proceeding, but rather a private Title VII class action filed

by respondent Hoffman in which EEOC has intervened pursuant to other, separate provisions of § 706.

The plain language of the statute provides absolutely no support for petitioners' contention that the prerequisites for direct suit by EEOC apply when EEOC has intervened in a private action. Indeed, the statute could hardly be clearer. Title VII contemplates two avenues by which EEOC may enforce the Act in the federal courts. First, it may file a direct action in its own name. As a prerequisite to such an action, §§ 706(b) and 706(f)(1) prescribe the administrative prerequisites of a reasonable cause finding and conciliation. Second, EEOC may, with leave of court, intervene permissively in a pending Title VII action brought by a private party. In that case, § 706(f)(1) also prescribes an administrative prerequisite, the certification by EEOC that the case is of general public importance. At no point in these proceedings have petitioners disputed that EEOC has fulfilled the prerequisite to intervention in this suit. *See* Resp. A. A5. No possible reading of Title VII could result in a finding that EEOC has not complied with all applicable requirements to intervention.

B. EEOC May Represent the Public Interest When It Intervenes.

Petitioners' second error is their assertion that when EEOC intervenes in a private action, it may not fulfill its statutory role of protecting the public interest without also complying with the administrative prerequisites to a direct suit. Neither the statute nor this Court's decisions support petitioners' position. As this Court stated in *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980), "the clear purpose of Title VII," *id.* at 324, requires that "[w]hen the EEOC acts, *albeit at the*

behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination," *id.* at 326 (emphasis added), and that forcing EEOC to comply with the requirements of Federal Rule of Civil Procedure 23 "might disable the enforcement agency from advancing the public interest in the manner and to the extent contemplated by the statute." *Id.* at 331. Although *General Telephone of the Northwest* happened to involve a suit brought by EEOC in its own name, its rationale applies equally to private suits in which EEOC has been permitted to intervene. There is no indication in this Court's opinion in *General Telephone of the Northwest* that the fulfillment of one set of statutory prerequisites to suit—the reasonable cause and conciliation requirements—could substitute for Rule 23, while the other prerequisite—the certification of general public importance—could not. Moreover, there is nothing in the language of § 706(f)(1) to support petitioners' contention that compliance with the requirements for intervention somehow limits EEOC to seeking relief only for the named private plaintiff. Indeed, the legislative history of the intervention provision of § 706(f)(1) indicates that its purpose is "to protect the Commission's interest in a case where [a] private litigant is involved." 118 Cong Rec. 4814 (1972).[3] That interest, as this Court recognized in *General Telephone,* is the public interest, which can require the representation of more than the

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3. There is almost no legislative history dealing with the EEOC's right to intervene. The issue was not discussed during the Senate and House debates on the 1972 amendments. Most of the proposed bills contained the intervention power, and the conference committee report, which adopted the intervention provision of § 706(f)(1), did not comment on it. S. Rep. No. 92-681, 92d Cong. 2d Sess. (1972). *See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 Geo. Wash. L. Rev. 824, 874-75 (1972).

specific individuals who filed charges with EEOC or who filed suit in federal court.

The administrative prerequisites to suit have nothing to do with the form of relief ultimately sought by EEOC or with the number of victims of discrimination whose interests are ultimately represented by EEOC. Their only relationship is the same that exists in any civil action between compliance with a requirement such as the statute of limitations and the relief sought by a plaintiff. Suit must be filed in time, or else no relief may be sought at all, but once a timely suit has been filed, the statute of limitations becomes legally irrelevant to whether or how much plaintiff recovers. Similarly, once the administrative procedures applicable to the manner in which EEOC becomes a litigant have been fulfilled, they are legally irrelevant to the nature of the relief sought by EEOC.

The purpose of the reasonable cause and conciliation prerequisites to direct suit by EEOC is to attempt to achieve voluntary compliance "in an informal, noncoercive fashion," and to avoid litigation by exploring settlement alternatives, "whenever possible . . . before suit is brought in federal court." *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 368 (1977). Congress was fully aware of the enormous backlog in the EEOC's caseload at the time of the 1972 amendments to Title VII that gave EEOC the right to file suit, *see, e.g.*, House Report No. 92-238, at 12-13, 92d Cong., 1st Sess. (1971), and, therefore, it retained the private cause of action. Congress also, however, envisioned a time when the backlog would be eliminated and EEOC would be the primary enforcer of the Act. "It is hoped that recourse to the private lawsuit will be the exception and not the rule . . ." 118 Cong. Rec. 7168 (1972) (section-by-section analysis

of Conference Report). Unfortunately, congressional hopes have not yet been met, and most Title VII suits are filed by private plaintiffs. Considerations of the voluntary compliance that might be achieved if EEOC is the only potential plaintiff no longer exist when the charging party has exercised her statutory right to sue, as respondent Hoffman has done here. Litigation can no longer be avoided, and, therefore, the rationale of the conciliation requirement has been rendered meaningless in such cases. Congress recognized this possibility by establishing the EEOC's right to intervene in private suits and requiring only that EEOC certify that its intervention is in the public interest.

Petitioners cannot point to any statutory purpose that would be served by compliance with the now inapplicable prerequisites to direct EEOC suit.[4] Not only is the only identifiable purpose of the prerequisites to direct suit absent when EEOC has intervened in pending litigation, but limiting *General Telephone of the Northwest* to direct EEOC suits would thwart the effective enforcement of Title VII. In the Tenth Circuit, the filing of a private Title VII action cuts off EEOC's ability to bring a direct suit based on the private plaintiff's charge and relegates the Commission to intervention in the private suit.[5] *EEOC*

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4. It should be noted that on several occasions, respondent Hoffman and EEOC have suggested the solution of the Eighth Circuit in a similar case, a sixty-day stay pending conciliation. *See Johnson v. Nekoosa-Edwards Paper Co.*, 588 F.2d 841 (8th Cir. 1977), *cert. denied sub nom. Nekoosa Papers, Inc. v. EEOC*, 434 U.S. 920 (1977). Petitioners have never responded to these offers. Moreover, representatives of EEOC met with petitioners as early as 1979 in an attempt to conciliate, with no success.

5. This fact alone serves to distinguish the footnote in *Horn v. Eltra Corp.*, 686 F.2d 439, 441 n.1 (6th Cir. 1982), on which petitioners rely. *Horn* was an appeal by EEOC from an order revoking its status as a permissive intervenor. While the

(Continued on following page)

v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977). Since a charging party may demand a right-to-sue letter and file suit at any time following the expiration of 180 days from the date the charge is filed, private suits involving issues of public concern may well be filed long before EEOC has had an opportunity to complete its administrative process. *Mills v. Bartenders International Union Local No. 41*, 21 F.E.P. 42 (N.D. Cal. 1975). To hold that *General Telephone of the Northwest* applies only to EEOC suits in its own name would be to subject the agency's ability to further the statutory purpose of effective enforcement of Title VII to the actions or inactions of charging parties, who are not within the Commission's control.

In 1976, when plaintiff exercised her right to demand a right-to-sue letter and file her private Title VII action, the EEOC's backlog of unprocessed charges was notorious.[6] A plaintiff who believed she had a meritorious case, as does respondent Hoffman, would have been ill-advised to allow evidence to become stale or witnesses to disappear while waiting for EEOC to act. By obtaining her right-to-sue letter and filing this action, plaintiff followed the prudent course, but once she did so, EEOC was no longer free to file its own direct action. In allowing plaintiffs

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Footnote continued—

appeal was pending, the private plaintiff's claim was settled, and the Sixth Circuit dismissed the appeal as moot. In the Sixth Circuit, however, a private Title VII action does *not* bar a subsequent direct EEOC suit based on the same charge. *See EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975). Even if there were a statutory purpose for conciliation once suit has been filed, it makes little sense to require the completion of prerequisites to a suit that cannot be brought.

6. In December 1977, the EEOC had a backlog of 99,000 charges. *Equal Employment Opportunity Commission, 17th Annual Report* 12 (1984).

to sue before completion of EEOC's processes, Congress cannot have intended to eliminate EEOC's later ability to enforce the Act in the public interest. For this reason, it provided that EEOC may intervene in private suits. It would violate the rationale and the public policy considerations of *General Telephone of the Northwest* to hold that EEOC may not represent the public interest under these circumstances.

C. The District Court's Ruling Will Not Cause a Flood of Litigation.

Petitioners contend that the district court's decision will cause a flood of Title VII litigation. This is not true. First, once EEOC has complied with the prerequisites for intervention under § 706(f)(1), the decision whether it will be permitted to intervene and, if so, under what conditions, are left to the discretion of the district court. As with any permissive intervention, the court may always control the extent of the intervenor's participation. *See generally* 7A C. Wright & A. Miller, *Federal Practice and Procedure*, §§ 1913, 1922 (1972 and Supp. 1984). Second, fears of massive EEOC litigation cannot be based on current data concerning the agency's activity. During the twelve-month period ending June 30, 1982, 7,689 employment civil rights cases were filed in the federal courts. *Annual Report of the Director of the Administrative Office of the United States Courts* 135 (1983), *contained in Reports of the Proceedings of the Judicial Conference of the United States* (1983). By comparison, in fiscal year 1982, EEOC filed 101 direct suits under Title VII, and intervened in only two private suits. *Equal Employment Opportunity Commission, 17th Annual Report* 25 (1984). In the year ending June 30, 1981, there were a total of 6,245 Title VII cases filed in the federal courts, *Annual Report of the*

Director of the Administrative Office of the United States Courts, supra at 135; in fiscal year 1981, EEOC filed 229 direct suits and intervened in six private suits, *Equal Employment Opportunity Commission, 16th Annual Report* 25 (1982). In the year ending June 30, 1980, there were 5,117 Title VII suits filed in the federal courts, *Annual Report of the Director of the Administrative Office of the United States Courts, supra* at 135; in fiscal year 1980, EEOC filed 200 direct suits and intervened in 10, *Equal Employment Opportunity Commission, 15th Annual Report* 14 (1982). The supposed "unlimited scope of the EEOC's litigating zeal" that petitioners decry, Pet. 16, simply is not borne out by the facts. There is no basis to believe that EEOC will not marshal its resources wisely and select its cases carefully. Third, if the result of this clear reading of the intervention provisions of Title VII and their legislative history leads to more federal court litigation than would the unsupportable interpretation advanced by petitioners, the appropriate forum to petition is not this Court, but Congress.

II. The Tenth Circuit Was Correct in Finding Mandamus Inappropriate in This Case.

Finally, under the decisions of this Court, the Tenth Circuit was clearly correct in holding that mandamus is not appropriate under the circumstances of this case. In *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980), this Court narrowly confined the use of the writ by ruling that "[o]nly exceptional circumstances amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy."

The primary reason for restricting the use of mandamus is the congressional policy underlying the final deci-

sion rule.[7] It is "in the interest of the fair and prompt administration of justice to discourage piecemeal litigation." *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). "It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). To protect the integrity of the final judgment rule and confine the use of mandamus to extraordinary circumstances, this Court has required that a party seeking issuance of the writ "have no other adequate means to obtain the relief he desires . . . and that he satisfy the burden of showing that [his] right is clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 35, *quoting Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953), and *United States v. Duell*, 172 U.S. 576, 582 (1899) (in-

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7. Petitioners claim that this Court should review the decisions of the District Court and the Tenth Circuit because they are "for all practical purposes" final. Pet. 15 n.5. Apparently, petitioners are referring to the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), under which a "small class" of orders that do not end the litigation may nevertheless be appealable as "final." There are three requirements for application of the collateral order doctrine. "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Without even discussing the first two factors, it is clear that the third is not met in this case. Assuming that the District Court's ruling was erroneous, any resulting harm to petitioners can be corrected on appeal from a final judgment. This is not a situation in which "denial of immediate review would render impossible any review whatsoever." *Compare Coopers & Lybrand v. Livesay, supra* (no immediate appeal from order decertifying class action) and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (no immediate appeal from pretrial denial of motion to disqualify counsel in civil case) *with Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (order denying claim of absolute immunity is appealable under *Cohen*).

ternal quotation marks omitted for simplicity). As the Tenth Circuit has noted:

> For mandamus to issue there must be (1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and preemptory duty on the part of the defendant to do the action in question; and (3) no other adequate remedy available.

Hadley Memorial Hospital, Inc. v. Schweiker, 689 F.2d 905, 912 (10th Cir. 1982). None of these factors is present here.

CONCLUSION

The decisions of the District Court and the Court of Appeals for the Tenth Circuit were correct. Petitioners have failed to show that these rulings were erroneous in any respect.

Respectfully submitted,

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BEST AVAILABLE COPY

(PLEASE PRINT OR TYPE)

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...RGE OF DISCRI...NATION	EEOC CHARGE NO. TKC 6-0227	FORM APPROVED OMB NO. 124-R0001

INSTRUCTIONS

...e a complaint, fill in this form and mail it to the Equal Employment ...ity Commission's District Office in your area. In most cases, a charge ...filed with the EEOC within a specified time after the discriminatory act ...ace. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS ...AS POSSIBLE. *(Attach extra sheets of paper if necessary.)*

CAUSE OF DISCRIMINATION

- ☐ RACE OR COLOR
- ☐ SEX
- ☒ RELIGIOUS CREED
- ☐ NATIONAL ORIGIN

(Indicate Mr. or Ms.) Ms. Phyllis J. Wilson		DATE OF BIRTH 5/9/47
STREET ADDRESS 4910 Barkley Apt. 79	COUNTY Johnson	SOCIAL SECURITY NO. 509-48-7050
CITY, STATE, AND ZIP CODE Mission, Kansas 66202		TELEPHONE NO. *(Include area code)* 831-9614 (Area Code 913)

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME *(Indicate Mr. or Ms.)* Mr. Arnold Hoffman		TELEPHONE NO. *(Include area code)* 913/888-4885
STREET ADDRESS 12216 W. 79th Terrace	CITY, STATE, AND ZIP CODE Lenexa, Kansas 66216	

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU *(If more than one, list all)*

NAME United Telecommunications, Inc., & United Systems Services, Inc. (See attached list A)		TELEPHONE NO. *(Include area code)* 913/ 384-7400
STREET ADDRESS 2330 Johnson Drive	CITY, STATE, AND ZIP CODE Westwood, Kansas 66205	

OTHERS WHO DISCRIMINATED AGAINST YOU *(If any)*	

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY ☒ YES ☐ NO	DATE FILED July 23, 1975	AGENCY CHARGE FILED WITH *(Name and address)* Kansas Commission on Civil Rights, State Capitol Building, Topeka, Kansas 66003
APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST		DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, and year)* May 9, 1975

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

I charge and allege the abovenamed employer is engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Law of 1972 . United Telecommunications, Inc. has maintained a continuing policy of sex discrimination toward me in compensation, terms, conditions and privileges of employment without a valid business motive. The company distinguished on the basis of sex in determining my salary, promotions and training opportunities and their discriminatory actions culminated in my being unjustifiably discharged from employment on May 9, 1975. These discriminatory acts have been, in part, a response to my efforts in my position in the United Telecommunications, Inc. industrial relations department to change company employment practices forbidden by Title VII. These harrassing and discriminatory practices violate Section 704(a) of Title VII. (Continued on attached sheet)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE 7/23/75	CHARGING PARTY *(Signature)* Phyllis Wilson

Subscribed and sworn to before this EEOC representative.

DATE	SIGNATURE AND TITLE

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(Day, month, and year)* July 23, 1975

SIGNATURE *(If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)*

Barbara M Riddle

BARBARA M. RIDDLE M.C.E. 10/9/78

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APPENDIX A

TKC6-0227

CHARGE OF DISCRIMINATION (Continued)

NAME: Ms. Phyllis J. Wilson

United Telecommunications, Inc., previously known as United Utilities, Inc. and United Systems Services, Inc., the parent company and its subsidiaries and divisions throughout the United States have also engaged in a widespread policy of discrimination in employment practices against women as a group. The discriminatory actions relate to and include hiring, promotion, compensation, terms and privileges of employment as well as training practices. Women in or eligible for managerial level positions are particularly discriminated against.

The discriminatory practices include, but are not limited to, the following:

1. Women are paid less than men for substantially similar work.

2. Women have lower salaries than men because of inequality based on sex in work assignments and promotional opportunities.

3. From Grade 14 of company job classifications up to the highest grade there are *significant* disparities in the number and percentage of women versus men employed. This is a direct result of the company's differentiation on the basis of sex.

4. Men are generally given job classifications which include more responsibility whereas women are allocated positions with responsibility levels below their capabilities.

5. The management development programs available within and outside the company include few women and

the criteria for entering such programs are vague allowing almost total discretion as to which employees are eligible.

6. Female applicants are channeled into the lowest paying job categories generally as operators or in clerical positions while men are recruited into higher-paying more prestigious jobs.

7. Among the obstacles to upward mobility within the company for women employees are the obscure and informal procedures of promotion and assignment to those departments with opportunities for progression to management level positions. The company does not post job openings or in other ways make available management openings known to women employees.

8. Women are not given adequate craft and technical training.

The above-named employer has also discriminated on the basis of religion against Jews as a group in employment practices relating to and including hiring, promotion, compensation, terms and privileges of employment as well as training practices. Jews in or eligible for managerial level positions are particularly discriminated against.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PHYLLIS WILSON HOFFMAN, et al., Plaintiff,	)	
and	)	
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	Case No.
Applicant for Intervention,	)	76–223–C2
vs.	)	
UNITED TELECOMMUNICATIONS, INC., et al.,	)	
Defendants.	)	

CERTIFICATE OF GENERAL PUBLIC IMPORTANCE

The U.S. Equal Employment Opportunity Commission has authorized the undersigned, the General Counsel of the Commission, to certify to the Court and I hereby certify that the Commission has determined this action to be of general public importance in accordance with 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Section 2000e-5(f)(1) (Supp. V, 1975).

Respectfully submitted,

/s/ Abner Sibal
Abner W. Sibal
General Counsel

(3)

Office-Supreme Court, U.S.
FILED
FEB 14 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1002

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., ET AL.,
PETITIONERS

v.

DALE E. SAFFELS, UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction over the Equal Employment Opportunity Commission's complaint in intervention where the EEOC had satisfied the statutory prerequisites for intervention set forth in Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), but had not also satisfied the statutory requirements for bringing a direct suit set forth in Section 706(b), 42 U.S.C. 2000e-5(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1002

UNITED TELECOMMUNICATIONS, INC., ET AL.,
PETITIONERS

v.

DALE E. SAFFELS, UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 741 F.2d 312. The memorandum opinion and orders of the district court (Pet. App. 6a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1984. A petition for rehearing was denied on September 28, 1984 (Pet. App. 18a-19a).

The petition for a writ of certiorari was filed on December 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November, 1976, Phyllis Hoffman filed this suit against United Telecommunications, Inc. (UTI) and its 38 subsidiaries alleging that UTI had discriminated against her with respect to her compensation and other terms, conditions, and privileges of employment, in violation of Sections 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and 2000e-3(a). She also alleged that UTI and its subsidiaries had engaged in widespread discriminatory employment practices against other women, and she sought to represent a class composed of "all females who are, were, or might be employed by [petitioners'] in managerial or professional positions at its headquarters in Westwood, Kansas, and at all offices of its subsidiaries and affiliates, and who have been or continue to be or might be adversely affected by" petitioners' discriminatory practices (Pet. App. 28a).

In September, 1977, the Equal Employment Opportunity Commission (EEOC) moved for leave to intervene in Hoffman's suit pursuant to Sections 705(g)(6) and 706(f)(1) of Title VII, 42 U.S.C. 2000e-4(g)(6) and 2000e-5(f)(1), and Rule 24(b) of the Federal Rules of Civil Procedure. EEOC's complaint in intervention made allegations of discriminatory employment practices that were substantially identical to those contained in Hoffman's complaint (Pet. App. 42a-48a). On September 21, 1977, the district court permitted the EEOC to intervene (see Pet. App. 8a).

For the next six years, the district court stayed all discovery on the class action issues and on the merits of the case pending the court's resolution of the question whether it had jurisdiction over petitioners' subsidiaries located outside the District of Kansas. After the court resolved that issue in complainants' favor,[1] on April 11, 1984, the court granted the joint motion of the EEOC and Hoffman permitting the EEOC to seek class-wide relief for the group of aggrieved individuals identified in their complaints without either EEOC or Hoffman being formally certified as a class representative under Fed. R. Civ. P. 23 (Pet. App. 6a-10a). The district court thereafter denied petitioners' request to certify the court's April 11 order for interlocutory appeal pursuant to 28 U.S.C. 1292(b) (Pet. App. 11a-14a), and petitioners filed a petition for a writ of mandamus in the court of appeals.

2. The court of appeals dismissed the petition for mandamus, ruling that the district court's order was within its jurisdiction (Pet. App. 1a-5a). The court found (*id.* at 3a-4a) that EEOC had satisfied the two statutory prerequisites for intervention in an ongoing private Title VII action—certification that the case is one of general public importance and timely application to intervene—and also noted that the district court had exercised its discretion to permit the EEOC to intervene. The court thus concluded that the EEOC was a proper party to this suit. The court also rejected petitioners' argument that the EEOC was required to satisfy the administrative prerequisites to filing suit whenever it sought to intervene in an ongoing action. As the court explained (Pet. App. 4a),

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[1] See *Hoffman* v. *United Telecommunications, Inc.*, 575 F. Supp. 1463 (D. Kan. 1983).

"[t]hat Congress required the Commission to satisfy certain administrative procedures before initiating a law suit on its own does not require us to find an ambiguity in the plain language of Section 706(f)(1), which permits intervention without requiring the satisfaction of those administrative procedures."

The court also held that the EEOC, once it had been allowed to intervene, was not required to be certified as a class representative under Fed. R. Civ. P. 23 in order to seek classwide relief for the group of individuals aggrieved by the discriminatory employment practices alleged in its complaint in intervention. The language of Title VII and its legislative history, the court concluded (Pet. App. 4a), indicate "that Congress viewed the Commission's role in suits initiated by it or in which it intervened to serve the identical purpose": vindication of the general public interest in preventing and remedying employment discrimination. Therefore, the court ruled that this Court's holding in *General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980), that EEOC enforcement actions are not governed by Fed. R. Civ. P. 23, applies equally when the EEOC intervenes in a private action (Pet. App. 5a).[2]

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[2] Following the court of appeals' ruling, petitioners moved in the district court for an order striking all classwide claims from Hoffman's complaint and amending the allegations of classwide discrimination in the EEOC's complaint to conform to those in Hoffman's original complaint (see Pet. App. 15a-16a). The district court held that its April 11 ruling rendered class certification for Hoffman unnecessary, and the court ordered Hoffman and the EEOC to conform the pretrial order to the court's April 11 ruling (*id.* at 16a-17a).

ARGUMENT

The sole question presented by the petition—whether the district court erred by permitting the EEOC to seek classwide relief as an intervenor without satisfying the administrative requirements necessary before the Commission may bring its own suit—is not properly before the Court at this time. Moreover, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is thus unwarranted.

1. While petitioners nominally seek review of the judgment of the court of appeals dismissing their petition for a writ of mandamus, petitioners do not contend that the district court lacked jurisdiction over the EEOC's motion for leave to intervene or the substantive claims presented in the EEOC's complaint in intervention (see Pet. 11 n.3). Rather, petitioners challenge the district court's April 11 order permitting the EEOC to seek classwide relief, and the basis of their claim is that the district court erroneously permitted the EEOC to seek classwide relief as an intervenor without having satisfied the administrative requirements of Section 706(b) of Title VII before the Commission may bring suit.[3]

Petitioners' contention is not properly before the Court at this time. The district court's April 11 ruling is not a final judgment, and it is also not an appealable collateral order, because it is not "effectively unreviewable on appeal from a final judgment" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468

[3] Petitioners do not argue that the EEOC must comply with Fed. R. Civ. P. 23 to seek relief, as an intervenor, for a class of aggrieved individuals, since they assert that Rule 23 is not relevant at this stage of the proceedings (Pet. 10 n.1).

(1978)). That ruling places petitioners in precisely the same position they would have occupied if the district court had erroneously certified Hoffman as a class representative under Rule 23, and an order granting class certification is interlocutory (437 U.S. at 469, 476). Moreover, the district court refused to certify this issue for interlocutory review under 28 U.S.C. 1292(b) (Pet. App. 11a-14a). Accordingly, unless the district court's ruling exceeded its jurisdiction (see *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam)), petitioners' contention is not properly before the Court at this time.

Petitioners contend (Pet. 14-15) that the administrative procedures specified in Section 706(b) are a jurisdictional requirement that the EEOC must satisfy before the district court may entertain the EEOC's claims in intervention. That claim is in error. Section 706(f)(1) of Title VII governs the Commission's authority to intervene in a pending Title VII action, and nothing in the text or legislative history of that Section suggests that the EEOC must satisfy the administrative procedures necessary to bring suit before the district court obtains jurisdiction over the Commission's claims in intervention. On the contrary, Section 706(f)(1) of Title VII provides that "[u]pon timely application, the court may, in its discretion, permit the Commission * * * to intervene in * * * [a] civil action upon certification that the case is of general public importance." 42 U.S.C. 2000e-5(f)(1). As the court of appeals ruled (Pet. App. 4a), because these requirements were met, the district court had jurisdiction over the Commission's claims under Section 706(f)(3) of Title VII, which grants the district court jurisdiction over actions brought under Title VII. Accord, *Johnson* v.

Nekoosa-Edwards Paper Co., 558 F.2d 841, 847 (8th Cir.), cert. denied, 434 U.S. 920 (1977) (EEOC may intervene without first attempting conciliation). The court of appeals thus correctly denied the petition for mandamus.

Horn v. *Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982), provides no support for petitioners' argument. In *Horn*, the EEOC was dismissed from a private suit after the Commission had been granted leave to intervene. While the EEOC's appeal of the district court's revocation order was pending, the private parties settled the action and the plaintiff dismissed her suit. The court of appeals treated the Commission's appeal from the revocation order as a new application to intervene and held that the EEOC could not intervene in an already-settled private action without satisfying the statutory requirements for bringing a direct suit.[4] *Horn* thus stands for the unremarkable proposition that the EEOC cannot intervene in a case that is moot. That decision, however, did not address the scope of EEOC's authority to intervene or to seek classwide relief in a pending suit. Petitioners' reliance upon *Horn* is thus misplaced.

Nor do the district court decisions on which petitioners rely (Pet. 17 & n.6) support their argument.

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[4] While we believe that the court in *Horn* erred in treating EEOC's appeal in that case as if it were a new application to intervene, it is clear that the court in *Horn* viewed the EEOC's appeal in that manner. That court based its ruling entirely on decisions involving a party's attempt to intervene in a suit where either the entire original action or particular claims of the original plaintiff had already been dismissed. See cases cited at 686 F.2d at 440. See also *EEOC* v. *Dayton Tire & Rubber Co.*, 573 F. Supp. 782, 786 n.5 (S.D. Ohio 1983) (characterizing *Horn* as a case where "the Court refused to permit the EEOC to intervene in an action that had settled").

In none of those decisions did the court rule that it lacked jurisdiction over the claims in intervention presented by the EEOC. Rather, those courts simply exercised their discretion to permit the EEOC to assert only those claims that had already been raised by the private plaintiffs. Those decisions thus do not support petitioners' argument that district courts lack jurisdiction over broader claims presented by the EEOC.[5] In fact, those decisions are fully consistent with the district court's ruling in this case, which permitted the Commission to intervene and to raise the same claims that Hoffman had alleged in her complaint.

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[5] The decisions cited by petitioners are distinguishable for another reason as well: each case involved the EEOC's attempt to expand the scope of the private suit then pending before the district court. See *Bell* v. *McDermott & Co.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,309 (E.D. La. 1982); *Benson* v. *Little Rock Hilton Inn*, 87 F.R.D. 447 (E.D. Ark. 1980); *Troup* v. *Piper, Jaffray & Hopwood, Inc.*, 16 Fair Empl. Prac. Cas. (BNA) 1554 (D. Minn. 1975); *National Organization for Women, Inc.* v. *Minnesota Mining & Manufacturing Co.*, 73 F.R.D. 467 (D. Minn. 1977); *Jones* v. *Holy Cross Hospital Silver Spring, Inc.*, 64 F.R.D. 586 (D. Md. 1974).

By contrast, in this case the claims in EEOC's complaint in intervention are virtually identical to the claims in Hoffman's complaint. The difference between this case and the district court decisions cited above has substantial importance. The question whether it is an abuse of discretion for the district court to permit the EEOC to continue to pursue classwide claims after the scope of a private suit is narrowed involves very different considerations from the question whether the EEOC should be permitted to seek classwide relief as an intervenor in the first place. Retroactively limiting the claims that the EEOC may raise as an intervenor in a private action after the EEOC has devoted considerable time and resources to the case unreasonably wastes the Commission's limited resources to enforce Title VII.

More importantly for present purposes, the district court's exercise of its discretion in permitting the EEOC, as an intervenor, to assert the same claims Hoffman had alleged, as the court of appeals correctly held (Pet. App. 5a), is not reviewable on mandamus (see *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. at 36). As the Court explained in *Allied Chemical Corp.* v. *Daiflon, Inc., supra*, a party seeking a writ of mandamus must show that his right to issuance of the writ is "clear and indisputable" (*id.* at 35 (citations omitted)), which he cannot establish where the matter in dispute is committed to the discretion of the court (*id.* at 36). Thus, because the issue on which petitioners seek review, whether the district court properly allowed the EEOC to seek classwide relief, is not properly before the Court in this mandamus proceeding, further review of the court of appeals' decision is unwarranted.

2. In any event, the court of appeals' ruling is correct. Petitioners do not seriously dispute the court of appeals' holding that neither the text of Sections 705(g)(6) and 706(f)(1) of Title VII nor the legislative history of those provisions (Pet. App. 3a-4a) requires the Commission, before intervening, to complete the administrative procedures necessary before the EEOC can bring suit in its own name. Nor do petitioners ask the Court to reconsider its holding in *General Telephone Co.* v. *EEOC, supra*, that the EEOC may seek classwide relief without satisfying the requirements of Fed. R. Civ. P. 23. Rather, petitioners claim (Pet. 10-16) that, as a matter of policy, the EEOC should be denied the right to pursue such claims as an intervenor until it has completed the Section 706(b) administrative prerequisites to a direct action. That claim is without merit.

The short answer to petitioners' argument is that, as the court of appeals recognized (Pet. App. 3a), Congress expressly authorized the procedure followed by EEOC in this case. Congress could easily have drafted the intervention provision of Section 706 (f)(1) to parallel the direct suit component of that section, but Congress did not, and the courts may not attribute that difference to legislative oversight (see, *e.g.*, *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 6-7). Because nothing in the legislative history of Section 706(f)(1) discloses "a clearly expressed legislative intention to the contrary," the unambiguous language of Section 706(f)(1) is "conclusive" (*Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Petitioners' reliance (Pet. 11-12) upon *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977), is misplaced. The sole question presented by that case was "what time limitation, if any, is imposed on the EEOC's power to bring [a Title VII] suit" against a private employer alleged to have violated that Act (432 U.S. at 357). Moreover, the Court's discussion of the administrative process established by Section 706(b) (see 432 U.S. at 359-360) was prefaced by the observation that it conditions "the EEOC's authority to *bring* a civil action in a federal court" (*id.* at 359 (emphasis added)). *Occidental Life Ins. Co.* nowhere suggested that those procedures also condition the Commission's authority either to intervene in a pending Title VII action or to seek classwide relief once the Commission is a party to an action. Indeed, *General Telephone Co.* v. *EEOC*, *supra*, expressly ruled that the EEOC has the authority to seek classwide relief for victims of discrimination and does not suggest that a different rule should be applied simply

because the Commission has chosen to intervene in a private Title VII action, rather than to bring a direct suit.

Nor do the policy considerations invoked by petitioners justify rewriting the statute. Congress required the Commission to investigate a claim of discrimination, to find reasonable cause to believe that the claim is true, and to attempt conciliation before filing a direct suit to ensure that all reasonable possibilities of voluntary compliance have been exhausted before the Commission resorts to litigation. See *EEOC* v. *Shell Oil Co.*, No. 82-825 (Apr. 2, 1984), slip op. 22; *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 367-368; *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d at 847. Once a private party has filed suit, however, the possibility of securing voluntary compliance is, at least, greatly diminished, and any marginal contribution toward that goal resulting from continued efforts at conciliation would be more than offset by the difficulties that the EEOC would face in its investigation of an actual, rather than a potential, defendant. Cf. *EEOC* v. *Shell Oil Co.*, slip op. 14, 25-26. In any event, Section 706(f)(1) empowers a court to stay proceedings up to 60 days pending the Commission's efforts at voluntary compliance. That procedure provides a mechanism through which litigation can still be avoided even though suit has been filed and the EEOC has intervened.

Petitioners' construction of Title VII could also render the Commission's right to intervene a nullity. In most cases, the opportunity for the Commission to intervene in a lawsuit arises where, in a case of general public importance, a charging party files suit before the Commission has finished its administrative process and thus has the opportunity to bring its own suit. Requiring the EEOC to exhaust the administrative process before filing a complaint in in-

tervention could prevent the Commission from protecting the public interest in privately-initiated suits by rendering the Commission's later attempt to intervene untimely (see *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d at 847), a matter of considerable importance given the complexity of the charges often filed and the length of time necessary to complete the "integrated, multistep enforcement procedure" established by Title VII (*Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 359; *EEOC* v. *Shell Oil Co.*, slip op. 6-9). In fact, this risk is especially acute in the Tenth Circuit, because, as the district court recognized (Pet. App. 10a), in that court the filing of a private Title VII action forecloses the Commission from bringing suit in its own name based upon the plaintiff's charges. *EEOC* v. *Continental Oil Co.*, 548 F.2d 884 (1977). The construction of Title VII advanced by petitioners could thus seriously hamper the EEOC's ability effectively to enforce the Act.

3. Petitioners also contend (Pet. 15-17) that the court of appeals' decision allows the EEOC to transform individual claims for relief into class suits simply by intervening and, in so doing, to evade the administrative process established by Section 706(b) merely by awaiting a private suit or through "contrivance" (Pet. 17) with plaintiff's counsel. That argument is misconceived.

In the first place, the court of appeals' decision does not empower the EEOC to seek classwide relief; the Commission has that authority, as this Court ruled in *General Telephone Co.* v. *EEOC*, by virtue of Sections 706(a) and 706(f)(1) of Title VII (446 U.S. at 323-325). The court of appeals simply declined to restrict that authority by engrafting onto Section 706 (f)(1) additional requirements not found in the text of the statute. Second, the claim that the EEOC can

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itself unwarrantedly and burdensomely transform private claims for relief into class actions overlooks the fact that the Commission's right to intervene in private Title VII actions is subject to the discretion of the district court, which retains the authority to limit the claims that the Commission may raise to those already presented by a private plaintiff, as the decisions petitioners themselves cite (Pet. 17 n.6) make clear. The court of appeals' decision in no way restricts the ability of a district court to exercise its discretion to limit intervention in an appropriate case or to stay further proceedings to allow the parties to attempt settlement if the court believes that doing so may be useful. More fundamentally, petitioners have cited no evidence that Congress intended to restrict the EEOC's authority to protect the public interest once the Commission has intervened in a private suit. Petitioners' real complaint therefore is not with the court of appeals' decision, but is with this Court's decision in *General Telephone Co.* v. *EEOC*, *supra*.[6]

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[6] The unusual posture in which this issue arose also renders further review inappropriate. It is clear that the EEOC has not in some way abused its authority to seek classwide relief in this case, even if that were relevant. Hoffman originally filed this suit as a class action, and that matter was still pending when the EEOC sought to intervene. Hoffman still sought certification as a class representative at the time the EEOC sought relief for the class identified in her complaint. Had Hoffman been certified as a class representative, either before or after the EEOC intervened, the issue presented by petitioners would be immaterial. This case therefore does not fairly present the situation that petitioners claim will become commonplace if the decision below is allowed to stand. The concerns petitioners raise are properly addressed in a case in which the private plaintiff declines to seek classwide relief from the outset. Because that is clearly not the situation here, this case does not merit further consideration.

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Petitioners' forecast (see Pet. [redacted] 16-17) that, unless the court of appeals' decision is set aside, the EEOC will hereafter abandon its efforts to secure voluntary compliance with Title VII is also in error. EEOC has always been firmly committed to the use of voluntary compliance as the preferred means of resolving Title VII cases and continues to settle the great majority of all charges filed. Indeed, throughout this litigation, EEOC has indicated its willingness, either formally or informally, to discuss voluntary settlement. The unusual facts of this case provide no basis for calling that commitment into question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1985

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No. 84-1002

IN THE
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OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,
v.
DALE E. SAFFELS, United States District Judge
for the District of Kansas,
Respondent.

(Phyllis Wilson Hoffman and Equal Employment Opportunity Commission, Real Parties in Interest.)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because Ms. Hoffman, a real party in interest, has not consented to the filing of the brief. The petitioner, United Telecommunications, Inc., the respondent, Honorable Dale E. Saffels, and the Solicitor General, on behalf of the EEOC, have consented

to the filing.[1] This *amicus* brief is timely filed under Supreme Court Rule 36.1, because it is filed within the time allowed for the filing of a brief in opposition to the petition for certiorari.[2]

This case arose when the EEOC intervened in a private civil action filed by an individual, prevailed in its effort to be deemed class representative, and sought to pursue class-wide relief. The Tenth Circuit's disposition of the case raises a problematic issue that requires resolution by this Court. That issue is whether the enforcement scheme of Title VII permits the EEOC to intervene in a private action and independently pursue class claims of employment discrimination when it has not taken those claims through its administrative procedures and the named plaintiff has not obtained class certification.

The Chamber is concerned about the possible ramifications of this decision in the business community, where an employer can now be subjected to class suit without the procedural protections afforded by the requirements that the EEOC investigate, determine reasonable cause, and attempt to conciliate before litigating, and that private plaintiffs obtain class certification before proceeding with class litigation. Absent these restraints, the Commission has a built-in incentive to avoid the demanding processes of investigation and conciliation that are prerequisites to suing in its own name, since it can achieve the same result with less bother simply by intervening in a private action. And plaintiffs seeking to represent a class would be able to avoid meeting the strict requirements of Fed. R. Civ. P. 23 simply by seeking EEOC intervention.

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[1] Copies of the consent letters are being filed simultaneously with the attached brief.

[2] The Solicitor General was granted an extension of time until February 14, 1985 within which to file a response to the petition for certiorari.

As the largest federation of business organizations and individuals in the country and the principal voice of the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber's current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers. As one of its principal functions, the Chamber regularly presents its views before this Court, as well as the lower federal courts.[3]

The Chamber fears that the procedure approved in this case will establish a troubling precedent and curtail the use of informal administrative processes to resolve allegations of class discrimination prior to litigation. Congress did not intend for EEOC suits in intervention to replace private class actions and direct agency suits for class relief. Such a result would fill the courts with unsubstantiated Title VII class suits and impose a severe burden on employers, who must defend such actions. For these reasons, the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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[3] *See, e.g., TWA* v. *Thurston*, 53 U.S.L.W. 4024 (U.S. January 8, 1985) (No. 83-997); *Bowen* v. *U.S. Postal Service*, 459 U.S. 212 (1983); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981); *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1002

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge
for the District of Kansas,
Respondent.

(Phyllis Wilson Hoffman and Equal Employment Opportunity Commission, Real Parties in Interest.)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief *Amicus Curiae* for a statement of the Chamber's interest in this proceeding.

ARGUMENT

This action came to the Tenth Circuit on the petition of United Telecommunications, Inc. ("UTI") for a writ of mandamus.[1] UTI asserted that the district court exceeded its jurisdiction in allowing the Equal Employment Opportunity Commission ("EEOC") to independently pursue class claims of discrimination after it entered a private suit as an intervenor.[2] The Tenth Circuit dismissed the petition, holding that the EEOC was neither required to comply with the class action requirements of Fed. R. Civ. P. 23 nor with administrative prerequisites before intervening and independently seeking class-wide relief. The Tenth Circuit focused on the straw man of whether the EEOC must complete administrative processes or comply with Rule 23 before intervening in a private action.[3] Petitioner does not challenge the EEOC's intervention in this action,[4] but rather its subsequent attempt to independently litigate uncertified, unprocessed class claims it could not otherwise bring to court.

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[1] The Chamber respectfully refers the Court to Petitioner's Statement of the Case, where the relevant facts and proceedings below are set forth, and incorporates the same herein by reference.

[2] EEOC intervention in a suit brought by an aggrieved individual is authorized by §§ 705(g)(6) and 706(f)(1) of the Civil Rights Act of 1964 as amended, Title VII, 42 U.S.C. §§ 2000e-4(g)(6), 2000e-5(f)(1).

[3] *See* Order and Opinion of the Tenth Circuit dated August 15, 1984, Pet. App. 4a ("That Congress required the Commission to satisfy certain administrative procedures before initiating a law suit on its own does not require us to find an ambiguity in the plain language of Section 706(f)(1), which permits intervention without requiring the satisfaction of those administrative procedures. It would be a tortured construction to conclude that when intervening, the Commission somehow becomes subject to Rule 23 when in fact the Supreme Court has made clear that the Commission is not subject to Rule 23 when bringing a direct action in the first instance."). ("Pet. App." refers to the appendix filed with this Court by the petitioner UTI.)

[4] *See* Petition for Certiorari (hereafter "Pet.") at p. 11 n.3.

By its decision in this case, the Tenth Circuit has approved a process whereby the EEOC can act upon an individual plaintiff's untested allegations of class harm, intervene and independently litigate a class action involving a company's entire personnel system. Because this contradicts the enforcement scheme of Title VII and potentially subjects businesses to frivolous and premature employment practice class suits, the Chamber supports the certiorari petition and urges this Court to grant review.

I. THE PROCEDURE ALLOWED BY THE LOWER COURT IN THIS CASE CONTRAVENES THE ENFORCEMENT SCHEME MANDATED BY TITLE VII AND STRIPS TITLE VII DEFENDANTS OF THEIR PROCEDURAL RIGHTS.

A. Congress Carefully Constructed An Enforcement Scheme to Preclude Improper Class Action Suits.

As enacted in 1964, Title VII did not empower the EEOC to sue employers to enforce the Act.[5] Rather, "[c]ooperation and voluntary compliance were selected as the preferred means" for achieving equality of employment opportunities.[6]

The 1972 amendments to Title VII[7] provided the EEOC with enforcement authority. Under these amendments, the Commission is empowered to initiate litiga-

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[5] Civil Rights Act of 1964, Pub. L. 88-352, Title VII, 78 Stat. 253 (codified at 42 U.S.C. § 2000e).

[6] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). These means are still preferred. *See, EEOC* v. *Shell Oil Co.*, 104 S.Ct. 1621, 1635 (1984); *W.R. Grace & Co.* v. *Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 103 S.Ct. 2177, 2186 (1983); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982); *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355, 368 (1977).

[7] Equal Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e).

tion to vindicate individual instances of employment discrimination, and to investigate and act on a charge of a pattern or practice of discrimination.[8] The prerequisites to EEOC litigation under either of these sections are investigation, determination of reasonable cause, and attempted conciliation.[9] The EEOC is also authorized to intervene in actions brought by individuals under § 706.[10] But the scope of the Commission's intervention is limited to those claims which the private plaintiff properly brings before the court or the EEOC uncovers in the course of investigation. *Bell* v. *J. Ray McDermott & Co., Inc.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,310 (E.D. La. 1982); *Benson* v. *Little Rock Hilton Inn*, 87 F.R.D. 447, 449 (E.D. Ark. 1980); *N.O.W., Inc.* v. *Minnesota Mining and Manufacturing Co.*, 73 F.R.D. 467, 471 (D. Minn. 1977); *Willis* v. *Allied Maintenance Corp.*, 75 F.R.D. 622 (S.D.N.Y. 1976); *Jones* v. *Holy Cross Hospital Silver Spring Inc.*, 64 F.R.D. 586, 591 (D. Md. 1974).

As this Court stated in *Occidental Life Insurance Co. of California* v. *EEOC*, *supra*, 432 U.S. at 368:

> [U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.

By contrast, in this action, the EEOC was allowed to proceed as class representative and the named plaintiff was precluded from proceeding in that capacity.[11]

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[8] Title VII, §§ 706, 707, 42 U.S.C. §§ 2000e-5, 2000e-6(a).

[9] These requirements are contained in sections 706(b), 706(f)(1), and 707(e), 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1), 2000e-6(e).

[10] *See* n.2, *supra*.

[11] *See* Memorandum and Order of District Court dated October 3, 1984, Pet. App. 16a ("[t]he purposes of the court's ruling

It was Congress' intent that the EEOC would not litigate claims unless conciliation was attempted and the efforts failed. As stated by Congressman Perkins, the House sponsor of the 1972 amendments to Title VII:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement.

118 Cong. Rec. 7563 (1972). And as this Court stated in *W.R. Grace*, *supra*, 103 S.Ct. at 2186, "[c]ritical to the compliance scheme is the Commission's role in settling Title VII disputes through conference, conciliation, and persuasion before a Title VII plaintiff or the Commission may bring suit." The EEOC should not be allowed to circumvent the Congressional scheme by intervening and independently litigating a class action without investigating or attempting to conciliate the matter.[12]

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allowing the EEOC to proceed as class representative would not be advanced by allowing plaintiff to retain the option to proceed as class representative").

[12] *See EEOC* v. *Brookhaven Bank & Trust Co.*, 614 F.2d 1022, 1026 (5th Cir. 1980) (Reavley, J., dissenting) ("Conscientious adherence to the statutory prerequisites is more than an exaltation of form over substance. The language of the statute insures that trifles do not become subjects of EEOC suits and that employers are not harassed by an overzealous EEOC staff."); *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 847-48 (8th Cir. 1977), *cert. denied sub nom. Nekoosa Papers, Inc.* v. *EEOC*, 434 U.S. 920 (1977) ("[c]onciliation is . . . an integral part of Title VII, . . . and is desirable for a variety of policy reasons including giving the defendant notice and an opportunity to respond to any additional claims revealed by the EEOC investigation and in order to avoid expensive and time-consuming court actions"); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 231 (5th Cir. 1969) ("we think it is clear that the purpose of certain of the procedural requirements of Section 2000e-5 is to protect employers from unfounded charges and harassment").

In the instant action, the EEOC seeks to litigate the claims of as many as 40,000 individuals in as many as 35 states and 100 separate facilities (Pet. at pp. 3-4). The congressional objective of achieving voluntary compliance with EEO laws and affording employers an opportunity to conciliate before litigating plainly survives with respect to class claims even after a plaintiff has brought suit on her own behalf. Indeed, the statute provides that the court may stay further proceedings for 60 days pending "further efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1).[13]

It is well recognized that an administrative agency cannot exceed the specific statutory authority granted it by Congress.[14] The role of agencies remains basically to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress.[15] They may not bootstrap themselves into areas in which they have no jurisdiction by violating their statutory mandates. *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973). The EEOC must conduct its enforcement activities within the enforcement scheme constructed by Congress.

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[13] *See also, EEOC* v. *Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 84 (3d Cir. 1984), *cert. dismissed*, 53 U.S.L.W. 3326 (U.S. Oct. 19, 1984) (No. 84-275) ("[t]he express policy of Title VII favors voluntary compliance not only before, but even after an EEOC suit is filed").

[14] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976); *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599, 610 (1930). *Accord, Atchison, Topeka & Santa Fe Ry. Co.* v. *ICC*, 607 F.2d 1199, 1203 (7th Cir. 1979).

[15] *Talley* v. *Mathews*, 550 F.2d 911, 919 (4th Cir. 1977). *Accord, Quarles* v. *St. Clair*, 711 F.2d 691, 708 n.60 (5th Cir. 1983); *Board of Trade* v. *SEC*, 677 F.2d 1137, 1142 n.8 (7th Cir. 1982), *vacated as moot*, 459 U.S. 1026 (1982); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374, 1380 (11th Cir. 1982); *Louisiana Chemical Association v. Bingham*, 657 F.2d 777, 779 (5th Cir. 1981).

The EEOC procedures of investigation and determination of whether there is reasonable cause to believe that class allegations are true provide employers with the same kinds of protections against improper class actions as those of Rule 23.[16] The EEOC's investigation and determination reveal whether the elements of a *bona fide* class action exist. Moreover, the conciliation requirement provides the employer with an opportunity to resolve the dispute without litigation. Compliance with the prerequisites of Title VII and Rule 23 will preclude unnecessary expenditures to defend lawsuits that Congress never intended be brought as class actions.

When there is a lack of Congressional guidance, this Court may defer to an agency's judgment regarding the scope of its authority. However, where there are "strong indications that agency flexibility [is] to be sharply delimited," the Court has declined to do so. *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 708 (1979).[17] This is just such a case. Congress has carefully restricted the EEOC's powers of suit to require that it first attempt informal methods of conciliation and persuasion. Accordingly, the Commission should not be allowed to exceed its delegated powers and circumvent the statutory scheme in this manner.

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[16] Rule 23 requires that the named plaintiff demonstrate, *inter alia*, numerosity, common questions of law or fact, typicality of the claims or defenses of the representative, and adequacy of the representative to protect the interests of the class. (The relevant provisions of Rule 23 are set forth at Pet. App. 23a-24a.) The defendant has the opportunity to challenge the existence of each of these factors.

[17] *See also, Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2781-82 (1984) ("[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

B. The Process Approved in This Case Permitted A Hybrid Class Action Suit to Proceed.

The EEOC moved to intervene permissively in this case more than two years after Ms. Hoffman filed an EEOC charge and 10½ months after the EEOC issued a notice of right to sue.[18] The district court allowed the EEOC to proceed as the class representative, even though the asserted purpose of this exercise was to "avoid[] the discovery and hearings necessary to obtain a determination pursuant to Rule 23 of the Federal Rules of Civil Procedure in regard to certification of [Hoffman] as a class representative and certification of this action as a class action." Memorandum in Support of Plaintiff and Plaintiff-Intervenor's Motion to deem EEOC as Representative of the Class at pp. 4-5. These are precisely the procedures that prevent improper class suits.

Had the EEOC sought to bring direct suit on the class claims, the action would have been dismissed due to the EEOC's failure to process the claims it sought to litigate. Had the named plaintiff sought to bring a class action, her allegations would have been held up to the standards of Rule 23. But the result of the lower court's decision was to allow the EEOC to accomplish by intervention what could not have been achieved otherwise; a class action suit based on bare, untested allegations of class harm. As this Court noted in *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 159 (1982), "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action." Such contradiction of the carefully constructed statutory enforcement scheme of Title VII must not be permitted.

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[18] A right to sue letter is issued by the EEOC following the completion of its administrative processes, or upon request of the complainant after the EEOC has had jurisdiction for 180 days. 42 U.S.C. § 2000e-5(f)(1). Plaintiff in this case requested a right to sue letter after 180 days.

Moreover, such a procedure would allow and even encourage named plaintiffs seeking to represent a class to avoid the strict prerequisites of Rule 23 by the simple device of seeking intervention by the EEOC. In this way, what is really a private action brought by a single plaintiff is converted into a far-reaching class action, without any showing by the named plaintiff that his claim is typical, or common, or that he shares any community of interest with other class members. This is exactly the type of "wholesale expansion" of class actions the Court in *General Telephone Co. of the Southwest* v. *Falcon* sought to prevent. 457 U.S. at 159.

C. Adherence to the Enforcement Scheme of Title VII Will Not Hinder the EEOC in Carrying Out Its Statutory Objective.

The EEOC has many opportunities under Title VII to ensure that a case is litigated as broadly or narrowly as it desires. In addition to its exclusive authority to bring suit for the first 180 days after a charge is filed (unless it dismisses the charge), and its authority to intervene and litigate any claims a private litigant properly places before the court, the Commission can also expand a private suit to include any claim it uncovers in the course of its investigation, so long as a reasonable cause finding is entered and conciliation is attempted. In sum, it is not the case that the Commission will be unable to vindicate the public interest in nondiscriminatory employment policies unless it is allowed to pursue, as an intervenor, class claims that it has not administratively processed. It need only await the outcome of the Rule 23 certification process initiated by a private plaintiff and participate as an intervenor, or comply with administrative prerequisites before bringing suit in its own name.

The district court below attached great importance to the fact that in the Tenth Circuit, the filing of a private Title VII action cuts off the EEOC's ability to bring a

direct suit based on the private plaintiff's charge, and relegates the Commission to intervention in the private suit.[19] This argument misses the mark. The EEOC's ability to enforce the statute is not subject to the actions of charging parties. As clarified by the Tenth Circuit in *EEOC* v. *Continental Oil Co.*, 548 F.2d 884 (10th Cir. 1977), when an individual brings suit on a charge of discrimination, the EEOC is thereafter precluded by Tenth Circuit law only from bringing a separate suit on that charge. As the *Continental Oil* court noted:

> If there are additional incidents of discrimination and the EEOC has foregone its opportunities to address them in a suit filed on a particular charge, additional charges may be obtained upon which to proceed. Further, if the additional incidents sought to be addressed are pervasive, the matter could be certified for § 707 processing, which section affords a broad based remedy without regard to individual charges or complaints.

Id., 548 F.2d at 890.

In the instant case, Ms. Hoffman's suit was never certified as a class action. Had it proceeded as an individual action, the EEOC would have been precluded only from filing a separate suit on Ms. Hoffman's charge. Had the action been certified as a class action, the EEOC's attempt to gain class-wide relief after intervening would have been appropriate. Thus, the Commission is not hindered by the actions of charging parties, but rather is subject only to the requirements of the statute.

D. Approval of the Procedure Used in This Case Would Create a Severe Burden on Employers and Other Title VII Defendants.

Defending class actions can place an extreme burden on employers and other Title VII defendants. The cost of

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[19] Memorandum and Order of District Court dated April 11, 1984, Pet. App. 10a.

defending a large class action discrimination suit can be devastating to a business, both in terms of lost working hours and counsel fees.[20] The requirements of Title VII that the EEOC investigate and attempt to conciliate any claim before litigating as well as the class action prerequisites of Fed. R. Civ. P. 23 provide protections against improper class action suits. *See generally, General Telephone Co. of the Southwest* v. *Falcon, supra,* 457 U.S. at 160-61.

One of the purposes of the requirement of administrative processing of claims by the EEOC before litigation is to allow input by the employer before suit is instituted.[21] Under the procedure used in this case, every business would be fair game for EEOC class suit, without opportunity to question, challenge or conciliate. This is not what Congress intended in enacting Title VII's "integrated multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in federal

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[20] *See Sperry Rand* v. *Larson,* 554 F.2d 868, 871 n.3 (8th Cir. 1977); *Schmidt* v. *Fuller Brush Co.,* 527 F.2d 532, 535 (8th Cir. 1975); *Herbst* v. *I.T.T. Corp.,* 495 F.2d 1308, 1312 (2d Cir. 1974).

[21] *See EEOC* v. *Sherwood Medical Industries, Inc.,* 452 F. Supp. 678, 683-84 (M.D. Fla. 1978) ("Once having determined that a respondent has violated Title VII, the Commission must make a genuine effort to conciliate with respect to each and every employment practice complained of. In this way, the respondent is afforded a fair opportunity to weigh all the factors which must be taken into account in deciding whether to settle a dispute out of court, even if the charge of discrimination in dispute arose from the Commission's own investigation rather than the charging party's charge. And if litigation then results, all parties are assured that they have had a fair opportunity to settle every matter in dispute. The Congressional mandate that litigation be a matter of last resort will have been observed."). *See also, Truvillion* v. *King's Daughters Hospital,* 614 F.2d 520, 524 (5th Cir. 1980) (the required EEOC notice of failure of conciliation protects the employer by warning him of his last chance to obtain an amicable resolution of the EEOC's complaint).

court." *Occidental Life Insurance Co. of California* v. *EEOC*, *supra*, 432 U.S. at 359.[22]

CONCLUSION

The Chamber believes that the holding of the Tenth Circuit could have wide-ranging ramifications in the business community, eroding the protections against improper class action suits contained in Title VII and Rule 23. Accordingly, the Chamber respectfully urges this Court to grant the petition for certiorari filed by UTI.

Respectfully submitted,

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[22] *See also*, *EEOC* v. *Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974) ("[t]he Commission's power of suit and administrative process [are not] unrelated activities, [but] sequential steps in a unified scheme for securing compliance with Title VII") (citation omitted).

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Real-Parties-in-Interest.)

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REPLY BRIEF FOR UNITED TELECOMMUNICATIONS, INC., ET AL.

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1. The Solicitor General's reliance on *General Telephone v. EEOC*, 446 U.S. 318 (1980), is misplaced. The Solicitor General states that *General Telephone* established that the EEOC has "the authority to seek class-wide relief" (Sol. Op. Cert. 10, 12); that *General Telephone* does not suggest that a different rule applies "because the Commission has chosen to intervene in a private Title VII action, rather than to bring a direct suit" (Sol. Op. Cert. 10-11); and that "Petitioner's real complaint . . . is not with the Court

of Appeals' decision, but is with this Court's decision in *General Telephone Co. v. EEOC, supra*" (Sol. Op. Cert. 13). By thus embracing *General Telephone*, the Solicitor General not only misapprehends the narrow ruling there set forth, but he beclouds the issue before the Court in this case.

First, as is pointed out in Petitioners' certiorari petition, pages 6-7, and as the Solicitor General does not deny, the EEOC never investigated the claims contained in Hoffman's charge of employment discrimination, never issued a "reasonable cause" finding, and never attempted conciliation within Title VII's meaning. Quite to the contrary, the decision in *General Telephone* is predicated on a different premise. Thus: "After investigation, the EEOC found reasonable cause to suspect discrimination against women and in April 1977 brought suit. . . ." *General Telephone Co. v. EEOC, supra*, 446 U.S. at 320. As it cannot here be asserted that the EEOC's effort to obtain class relief followed "after investigation" by the EEOC of Hoffman's class-wide claims or after a "reasonable cause" finding by the EEOC with respect to such claims, the emphasis the Solicitor General gives to *General Telephone* is singularly inappropriate. As was stated by this Court, "[c]ritical to the compliance scheme is the Commission's role in settling Title VII disputes through conference, conciliation and persuasion before . . . the Commission may bring suit." *W.R. Grace & Company v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, —— U.S. ——, 76 L.Ed.2d 298, 310 (1983).

Second, the Solicitor General's reliance on *General Telephone* ignores the fact that *General Telephone*

reflects a split decision by a majority of five Justices (Justices White, Brennan, Stewart, Marshall and Blackman), with four Justices (The Chief Justice and Justices Powell, Rehnquist, and Stevens) holding the view that the EEOC should have been required to seek class certification under Rule 23 of the Federal Rules of Civil Procedure in order to maintain that suit. *General Telephone*, therefore, is hardly a prop sturdy enough to warrant its extension to a situation that is markedly different both factually and substantively.

2. The Solicitor General argues that, because Congress did not draft the intervention provision of Section 706(f)(1) to parallel the direct suit component of that section, it must therefore be concluded that "Congress expressly authorized the procedure followed by the EEOC in this case" (Sol. Op. Cert. 10). The Solicitor General's argument cannot be reconciled, however, with the fact that when Congress wished to authorize the government to exercise full enforcement power as an intervenor under the Civil Rights Act of 1964 express statutory language was crafted to communicate that intention.

Thus, in contrast to the intervention provision of Section 706(f)(1) of the Civil Rights Act of 1964, which grants the EEOC the limited right to apply for permissive intervention, Section 902 of the same Act allows the Attorney General to intervene *as of right* in private actions seeking relief from denial of equal protection of laws under the Fourteenth Amendment. 42 U.S.C. § 2000h-2. More importantly, Section 902 further states: "*In such action the United States shall be entitled to the same relief as if it had instituted the action*" (emphasis added). Significantly, it

is this latter explicit language which has been held to permit the government (1) to expand the scope of private litigation through intervention, *Spangler v. United States*, 415 F.2d 1242, 1244-46 (9th Cir. 1969); and (2) to continue to seek class relief as an intervenor in a private action despite the absence of any class certification, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430-31 (1976). In short, the fact that such language was included in Section 902, but not in Section 706, demonstrates that the EEOC does not have the authority in its role as intervenor which the Solicitor General claims.

3. Like the Court below, the Solicitor General obfuscates the issue by his references to the EEOC's right to intervene in a private action. Thus: "Petitioners' construction of Title VII could also render the Commission's right to intervene a nullity" (Sol. Op. Cert. 11); and "Requiring the EEOC to exhaust the administrative process before filing a complaint in intervention could prevent the Commission from protecting the public interest in privately-initiated suits. . ." (Sol. Op. Cert. 11-12). However, as Petitioners noted in their certiorari petition, page 11, note 3, Petitioners are *not* challenging the EEOC's right to intervene in Hoffman's suit. Nor do Petitioners contend that the statutory administrative requirements which Petitioners rely on had to be completed before such intervention was allowed. Rather, Petitioners are contending that although the EEOC's intervention in Hoffman's suit may have been permissible, the mere fact that intervention was allowed is not adequate reason for ignoring the statutory dictates, and does not entitle the EEOC to don the mantle of class-wide representative without first conducting the appropriate investigation of Hoffman's class allega-

tions and without making a "reasonable cause" determination with respect to such allegations.[1]

4. The Solicitor General argues that "[r]etroactively limiting the claims that the EEOC may raise as an intervenor in a private action after the EEOC has devoted considerable time and resources to the case unreasonably wastes the Commission's limited resources to enforce Title VII" (Sol. Op. Cert. 8, n.5). Petitioners submit, however, that it is more in keeping with Congressional intent for the EEOC to channel its resources towards administratively investigating and attempting to obtain voluntary compliance before instituting suit, rather than seizing upon the totally unsubstantiated class allegations of a single individual as the boundaries for the EEOC's own suit in intervention and thereby imposing unnecessarily upon the equally limited resources of the judicial sys-

[1] When it sought intervention, the EEOC revealed no intention of taking over the role of class representative. Indeed, such an intention was seemingly disclaimed. For in support of its intervention motion, the EEOC represented to the District Court that its participation in Hoffman's case not only "could prove of assistance to the Court" with respect to "critical" aspects of on-going discovery, but stated in addition that because "the class has not yet been certified," "[t]he EEOC could also assist in the class delineation" (Pet. App. H, p. 50(a)). In these circumstances, the Solicitor General clearly misses the mark in commenting that the EEOC's "right to intervene is subject to the discretion of the district court," and that the latter court is empowered "to limit intervention in an appropriate case" (Sol. Op. Cert. 13). More to the point and appropriate would have been an admission by the Solicitor General that the EEOC's action in this case in claiming authority to seek class-wide relief was inconsistent with its earlier representation to the District Court in support of its intervention motion, and that the District Court may well have been misled thereby.

tem and Title VII defendants. Further, having chosen not to initiate its own direct action, the EEOC should not be heard to complain if the scope of the private plaintiff's action is subsequently narrowed. Finally, if the EEOC is dissatisfied with the ultimate scope of its suit in intervention, it may always initiate a separate action in its own right under either § 706 or § 707.

5. Hoffman, the private plaintiff, argues that because she "has exercised her statutory right to sue," litigation over the class claims being asserted by the EEOC "can no longer be avoided," and, thus, that there is no "purpose that would be served by the now inapplicable prerequisites to direct EEOC suit" (Hoff. Op. Cert. 8). The Solicitor General makes a similar contention (Sol. Op. Cert. 11). This argument, however, ignores Hoffman's present status in the litigation. Having failed to move for class certification pursuant to Rule 23, Hoffman may proceed solely on her personal claims. Thus, it is only as to those highly individualized claims (involving one facility, a single corporate defendant, and a time frame of less than two years) that litigation can no longer be avoided. As to the broad class claims that the EEOC now seeks to litigate independently of Hoffman, claims which involve some 38 additional defendants, another 400 facilities, and which extend over a ten-year period, litigation can and should be avoided until the EEOC complies with the statutory prerequisites to suit in its own right. *W.R. Grace & Company v. Local Union 759, supra*; *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355 (1977). As to these class claims, the Congressional objective of achieving voluntary compliance with EEO laws and affording

employers an opportunity to conciliate before litigating plainly applies.

Respectfully submitted,

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Dated: February 27, 1985

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No. 84-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

DALE E. SAFFELS, United States District Judge for the District of Kansas,
Respondent,

(PHYLLIS WILSON HOFFMAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Real-Parties-in-Interest.)

SUPPLEMENTAL BRIEF FOR UNITED TELECOMMUNICATIONS, INC., ET AL.

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Real-Parties-in-Interest.)

SUPPLEMENTAL BRIEF FOR UNITED TELECOMMUNICATIONS, INC., ET AL.

This Supplemental Brief for Petitioners, United Telecommunications, Inc., *et al.*, is filed, pursuant to Rule 22.6 of the Court's Rules, to bring to the Court's attention a Memorandum and Order of the District Court entered in this cause on March 6, 1985. The petition herein was filed on December 24, 1984; a Reply Brief was filed by Petitioners on February 27, 1985.

In its March 6, 1985, Memorandum and Order (pertinent extracts from which are reproduced in the Appendix hereto), the District Court denied Petition-

ers' motion for an order enforcing the District Court's October 3, 1984 ruling (see Pet. Cert. 6, 16a) that plaintiff Hoffman could not "retain the option to proceed as class representative," and prohibiting plaintiff Hoffman's counsel from participating in the representation of the class which the EEOC had been designated by the District Court to represent. The District Court found in its March 6, 1985, Memorandum and Order that "[t]he EEOC has specifically authorized plaintiff's counsel, David Waxse, to coordinate discovery on behalf of the EEOC" (App. 2a). However, relying for the most part on its further finding that "there is no conflict between the interests of Hoffman and the EEOC", the District Court concluded that there is "nothing objectionable in . . . allow[ing] Mr. Waxse to coordinate and *lead* the discovery efforts in this case" [emphasis added] (App. 2a).

Petitioners submit that the District Court's action on March 6, 1985, shows dramatically how the courts below have in this case countenanced the circumvention of Section 706 of Title VII and Rule 23 of the Federal Rules of Civil Procedure. Thus, we have now come full circle. First, the EEOC was erroneously allowed to bypass Section 706's administrative prerequisites and to assume the mantle of representing the class named in Hoffman's suit. Then, in view of the status thus granted the EEOC, Hoffman was ruled ineligible to represent that class.[1] Now, totally inconsistent with the latter ruling, Hoffman's counsel, who necessarily would have been the *real and active* rep-

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[1] In the March 6, 1985, Memorandum and Order, the District Court acknowledged that "[o]n October 3, 1984, this court held that plaintiff Hoffman may not retain the option to proceed as class representative" (App. 2a).

resentative of the class had Hoffman in fact achieved Rule 23 class certification, is to be allowed to "lead" the discovery efforts with respect to the class. In sum, the procedural charade by the EEOC and Hoffman has truly emasculated the statute and the applicable procedural rules.

Respectfully submitted,

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Dated: March 12, 1985

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 76-223-C2

PHYLLIS WILSON HOFFMAN,
Plaintiff,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff/Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

There are two motions before this court: defendants' motion for enforcement of the court's order of October 3, 1984; and defendants' motion for reconsideration of the court's order of December 19, 1984. The court has determined that oral argument would not be of material assistance. . . .

* * * *

With regard to the motion for enforcement, some background is important. By order dated April 11, 1984, this court allowed plaintiff/intervenor Equal Employment Opportunity Commission [hereinafter EEOC] to act as the class representative without requiring the EEOC to satisfy the class representative

requirements of Rule 23, Federal Rules of Civil Procedure. On October 3, 1984, this court held that plaintiff Hoffman may not retain the option to proceed as class representative. Subsequent to these orders, plaintiff and plaintiff/intervenor have jointly prosecuted the case, including discovery requests. The EEOC has specifically authorized plaintiff's counsel, David Waxse, to coordinate discovery on behalf of the EEOC. Defendants' motion seeks an order directing plaintiff Hoffman's counsel, Mr. Waxse, and Karen Plax, to cease their participation in the "class" aspects of this case.

In the prosecution of civil rights lawsuits, the federal courts encourage enforcement of the civil rights laws and make every effort not to impede those seeking to enforce the laws. The courts attempt to reach the substantive merits of such claims, guided always by the Federal Rules of Civil Procedure and the laws of the United States. Mr. Waxse is counsel for plaintiff Hoffman and has been involved in this lawsuit, including its class aspects, since 1976. He is the counsel whom plaintiff and the EEOC believe is most knowledgeable and familiar with the facts of this case. In the context of this employment discrimination action, the court finds nothing objectionable in the cooperation exhibited between plaintiff and the EEOC to allow Mr. Waxse to coordinate and lead the discovery efforts in this case. There is no conflict between the interests of Hoffman and the EEOC. This cooperation between the EEOC and plaintiff Hoffman can only encourage expeditious and aggressive discovery and resolution of this lawsuit.

Defendants' motion would only hamper the EEOC's efforts as class representative by negating the EEOC's

decision to rely on Mr. Waxse's familiarity with the case, thus defeating the federal policy of encouraging resolution of employment discrimination lawsuits on the merits. So long as Mr. Waxse and Ms. Plax remain counsel of record in this case, and the EEOC continues to authorize them to participate, on behalf of the EEOC, in the class aspects of this case, the court declines to direct them not to participate. Thus, there is no matter in the October 3, 1984, order which requires the court's enforcement.

* * * *

IT IS FURTHER ORDERED that defendants' motion for enforcement of the court's order dated October 3, 1984, is hereby denied.

DATED: This 6 day of March, 1985, at Kansas City, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge